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No. 09-1121

In The Supreme Court of the United States

J. MICHAEL BROWN, Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, JANIE P. MILLER, Secretary of the Cabinet for Health and Family Services, Commonwealth of Kentucky, and KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.,

Petitioners,

v.

ALICIA PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, and ELWOOD STURTEVANT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents important Article III standing questions involving an Establishment Clause challenge to contracts between Kentucky executive branch agencies and a private, religiously affiliated entity that provides social services to thousands of abused and neglected wards of the Commonwealth. The billions of dollars in direct State funding and federal pass-through funding for these and similar engagements in many other States necessarily derive from legislatively authorized budgets. However, there has been no legislative enactment expressly appropriating funds for this engagement.

Flast v. Cohen, 392 U.S. 83 (1968) established that taxpayers lack Article III taxpayer standing for Establishment Clause challenges unless a nexus exists between the taxpayer's status "and the type of legislative enactment attacked." Here, the U.S. Court of Appeals for the Sixth Circuit, following *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), correctly held that the Respondents lacked Article III standing as federal taxpayers because no explicit legislative enactment was at issue. The Sixth Circuit, however, created an acknowledged circuit conflict when it also held, contrary to *Hein* and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006), that Respondents need not establish *Flast*'s legislative enactment nexus for State taxpayer standing, thus enabling Respondents to proceed with an

QUESTIONS PRESENTED – Continued

Establishment Clause challenge as *State* taxpayers that Article III denies them as *federal* taxpayers.

The questions presented by this petition are, accordingly, the following:

1. Does *Flast v. Cohen*'s "legislative enactment" nexus test apply to State taxpayers as it does to federal taxpayers?

2. Does Article III confer upon the federal courts broader authority to address alleged Establishment Clause violations by State Legislatures than those same courts have to address alleged Establishment Clause violations by Congress?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are J. Michael Brown, Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, in his official capacity; Janie P. Miller, Secretary of the Cabinet for Health and Family Services, Commonwealth of Kentucky, in her official capacity; and Kentucky Baptist Homes for Children, Inc.

Respondents are Alicia Pedreira; Karen Vance; Paul Simmons; Johanna W.H. Van Wijk-Bos; and Elwood Sturtevant. Vance is a federal taxpayer and all others are both federal and Kentucky taxpayers.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Petitioners state as follows:

Kentucky Baptist Homes for Children, Inc. is a non-profit Kentucky corporation, and has neither a parent corporation nor any publicly held corporation that owns ten percent or more of its stock.

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DECISIONS BELOW

The United States Court of Appeals for the Sixth Circuit entered its panel decision on August 31, 2009. This decision is reported at 579 F.3d 722 (6th Cir. 2009), and is reprinted at Petitioners' appendix ("App.") 1-26. The Sixth Circuit subsequently entered an order denying Petitioners' petition for rehearing and rehearing *en banc* on December 16, 2009. This order is unreported but reprinted at App. 52-53.

The United States District Court for the Western District of Kentucky, the court of first instance, entered its final opinion and order on March 31, 2008. This opinion is reported at 553 F.Supp.2d 853 (W.D. Ky. 2008), and is reprinted at App. 29-49.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its panel decision on August 31, 2009. Petitioners' petition for rehearing and rehearing *en banc* was denied on December 16, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under

this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. Factual Background

1. Kentucky's Contracts with Kentucky Baptist Homes for Children, Inc. Are Due Exclusively to Executive Branch Discretion.

Kentucky has the nation's highest mortality rate for abused and neglected children. Thousands of Commonwealth wards each year require intensive

residential treatment and therapy to overcome the devastating effects of this abuse and neglect. Executive branch agencies of the Commonwealth engage a wide array of secular and religiously affiliated providers to fulfill this responsibility.

Petitioner Kentucky Baptist Homes for Children, Inc. ("KBHC") is the largest private residential child care provider in Kentucky. While KBHC receives substantial funds from private donors, it also receives public funds through discretionary contracts with Kentucky executive branch agencies, including Petitioner Cabinet for Health and Family Services and Petitioner Justice and Public Safety Cabinet's Department of Juvenile Justice (collectively, through their respective secretaries, the "Kentucky Petitioners"). *See, e.g.*, excerpted Private Child Care Agreement Between Cabinet for Health and Family Services and KBHC (July 1, 2004) (without attachments), App. 114-126.

The Commonwealth's decision to contract with any child care provider at all – much less a private child care provider, or a religiously affiliated child care provider, or KBHC specifically – rests solely with those executive branch agencies. The terms of the Commonwealth's service contracts with KBHC are created solely by those agencies. Finally, the authority to determine KBHC's compliance with those contract terms rests solely with those agencies.

These contracts promise only to reimburse KBHC after-the-fact for audited, documented, secular child

care expenses. In other words, it is not a grant program. This reimbursement, in turn, is provided by executive agency expenditures of money generally appropriated to each agency by the Kentucky General Assembly (and, indirectly, by Congress) for general, unrestricted child care purposes. Indeed, any public funds that eventually make their way to the Kentucky Petitioners, and then KBHC, *must* originate with the Kentucky General Assembly. Section 230 of the Kentucky Constitution states that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law." Sections 36(1) and 171 of the Kentucky Constitution provide the General Assembly with the exclusive power to tax and spend.

The General Assembly has not, however, used these powers to mandate or expressly designate expenditures for out-of-home child care placement services of any sort, public or private. Likewise, Congress has not used its taxing and spending power to dictate such expenditures. *See* 42 U.S.C. § 672(b)(2) (federal Social Security Act provision permitting, but not requiring, States to use funds appropriated under that Act to pay public or private child care entities), App. 54. KBHC's participation in Kentucky's social services system is controlled exclusively by the Kentucky Petitioners.

2. Respondents' Substantive Establishment Clause Allegations Exclusively Target Kentucky's Executive Branch Contracts.

On April 17, 2000, Respondents filed this action in the United States District Court for the Western District of Kentucky. All Respondents brought claims against the Kentucky Petitioners pursuant to 42 U.S.C. § 1983 alleging violations of the Establishment Clause of the First Amendment to the U.S. Constitution.[1] KBHC was named as a necessary party to these claims pursuant to Fed. R. Civ. P. 19.

Respondents, all Kentucky and/or federal taxpayers, objected to the receipt and use of taxpayer funds by KBHC in light of its religious affiliation and inspiration. Specifically, Respondents alleged that KBHC wrongfully used state and federal funds to "hire employees who [were] required to accept and abide by the institution's religious beliefs, and to pay for services that [sought] to teach youth the institution's version of Christian values." *See* Amended Complaint, Introduction, App. 82-83. As to these taxpayer claims, Respondents requested declaratory relief, an order prospectively enjoining the Kentucky Petitioners from providing further funding to KBHC

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[1] Additionally, two of the Respondents alleged that KBHC had discriminated against them because of religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, or the Kentucky Civil Rights Act, K.R.S. § 344.010 *et seq.* These claims were conclusively resolved in KBHC's favor. *See* 579 F.3d at 727-28 (panel decision affirming dismissal pursuant to Fed. R. Civ. P. 12(b)(6)), App. 8-12.

for staff positions purportedly filled in accordance with religious tenets, and an order requiring KBHC to reimburse Kentucky for State funds used to finance such positions. *Id.*, Request for Relief, App. 110-112. Respondents' subsequent amended complaint stressed their status as federal taxpayers and the manner in which State and federal funds eventually reached KBHC, but did not amend Respondents' request for relief. *See generally* Amended Complaint, App. 82-113.

3. Respondents Base Their Article III Standing on Legislative Activity That Is Not Challenged as Unconstitutional.

Petitioners have consistently challenged Respondents' Article III standing to sue, citing this Court's general bar against taxpayer standing and the narrow exception for Establishment Clause cases met only by satisfying the exacting "legislative enactment" nexus requirement established in *Flast v. Cohen*, 392 U.S. 83 (1968).[2] Critically, Respondents have never based their putative *Flast* taxpayer standing on the activities they challenged as unconstitutional: the Kentucky Petitioners' discretionary executive branch

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[2] Petitioners' initial standing challenges were denied by the District Court under then controlling circuit precedent. *See Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501, 507 (6th Cir. 2001). Petitioners' renewed dispositive motions made after this Court's decision in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), however, were granted, giving rise to the instant appeal. 553 F.Supp.2d at 862, App. 49.

contracts with KBHC or the administration of those contracts. Nor do Respondents challenge the appropriation statutes generally funding the Kentucky Petitioners.

Respondents have instead sought to show, through other legislative activity, that the General Assembly "knew" and constructively "approved" of the Kentucky Petitioners' contracts with KBHC and their alleged maladministration of those contracts. This legislative activity included (1) enabling statutes authorizing (*i.e.*, not requiring) executive branch agencies to spend money on child care generally, *see* K.R.S. §§ 199.641(2), 200.115, 605.120, App. 61-62, 63, 72-74; (2) regulatory statutes authorizing executive branch agencies to condition a child care provider's eligibility for public service on various licensing criteria, *see* K.R.S. §§ 199.640(1), (5)(a)-(b), 199.650, 605.090, App. 55, 56-59, 62, 64-72; (3) a bricks-and-mortar appropriation of the Kentucky General Assembly made in 2005, five years after Respondents' Complaint was filed, for the construction of classrooms for State wards educated at KBHC, *see* 2005 Ky. Laws Ch. 173 (H.B. 267, Part I, § H.10(5)), App. 75-77; and (4) a legislative commendation approved by one house of the bicameral General Assembly in 2006, six years after Respondents' Complaint was filed, thanking KBHC for its secular work with abused and neglected children, *see* Ky. H.R. Jour., 2006 Reg. Sess. No. 57, March 24, 2006, Leg. Citation No. 142, App. 80-81.

Respondents urged that these legislative activities created an irrefutable presumption that the General Assembly was necessarily linked to *any* child care funding that found its way to KBHC – and, in turn, was inextricably linked to the alleged misuse of those funds by KBHC. These links, Respondents concluded, constituted a sufficient nexus between an explicit legislative appropriation and an alleged Establishment Clause violation to support taxpayer standing under this Court's precedents.

Alternatively, Respondents argued this Court's Establishment Clause taxpayer standing canon, including *Flast*, was inapplicable to State taxpayers altogether. In support of their argument, Respondents cited a 2001 Sixth Circuit panel decision permitting State taxpayers to establish standing for an Establishment Clause challenge by simply alleging an offending expenditure of public funds, measurable appropriation, or loss of revenue. Respondents further contended that the Supreme Court's decisions generally equating State and federal taxpayer standing were distinguishable as a matter of law, and thus inapposite.

B. Proceedings Below

1. The District Court Granted Petitioners' Motions to Dismiss for Lack of Standing Based on this Court's Recent *Cuno* and *Hein* Decisions.

On March 31, 2008, the District Court granted Petitioners' motions to dismiss Respondents'

Establishment Clause claims for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1).[3] App. 29-49. These motions were filed shortly after this Court decided *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), which had illuminated the narrow *Flast* "legislative enactment" nexus.

Having concluded that *Flast* was applicable to Respondents' claims, regardless of whether they are characterized according to the federal or state taxes paid, the District Court determined that there was no standing in either context due to the absence of the requisite legislative enactment nexus. 553 F.Supp.2d at 858-59, App. 39-41. In reaching this decision, the court relied on *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006) as well as *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 506 F.3d 584 (7th Cir. 2007), a post-*Cuno*, post-*Hein* Establishment Clause case brought by Indiana taxpayers that had applied the *Flast* analysis to deny State taxpayer standing. 553 F.Supp.2d at 858-59, App. 39-41.

The District Court determined that Respondents' pleadings did not allege the direct, legislative Establishment Clause violation required by *Flast*, finding, in relevant part:

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[3] Respondents' religious discrimination claims had been dismissed in 2001. 186 F.Supp.2d at 762. Accordingly, this final and appealable March 31, 2008 order resolved all claims in Petitioners' favor.

> [T]he Amended Complaint fails to allege any particular appropriation, and thus obviously also fails to allege any legislative action through such appropriation which exceeded the taxing and spending powers of the legislature. Thus no nexus has been shown between any legislation, state or federal, and the alleged constitutional violation. The sole focus of the Amended Complaint is the contracts between KBHC and the Kentucky agencies.

553 F.Supp.2d at 861, App. 47. Consequently, the District Court dismissed Respondents' Establishment Clause claims for lack of Article III standing. *Id.* at 862, App. 49.

2. The Court of Appeals Affirmed the District Court on Federal Taxpayer Standing, But Reversed the District Court on State Taxpayer Standing.

Respondents timely appealed to the Court of Appeals. While affirming on the issue of federal taxpayer standing pursuant to *Hein*, a three-judge panel of the Sixth Circuit[4] reversed the District Court on the issue of State taxpayer standing. The panel held that State taxpayer standing required only a "good faith pocketbook injury" – purportedly satisfied here by Respondents' assertion of "lost revenue" – and

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[4] One member of the panel, the Hon. J. Ronnie Greer, U.S. District Judge for the Eastern District of Tennessee, sat by designation.

that *Flast*'s "legislative enactment" nexus requirement was wholly inapplicable to State taxpayers. 579 F.3d at 731-33, App. 19-24.

In reaching this conclusion, the panel expressly acknowledged its decision was in conflict with the Seventh Circuit's decision in *Hinrichs*, *supra*, but failed to distinguish its reasoning from that of the *Hinrichs* Court. *Id.* at 732, App. 21. In effect, the Sixth Circuit brushed off the post-*Cuno*, post-*Hein* *Hinrichs* decision in favor of its own pre-*Hein*, pre-*Cuno* precedent. *See Johnson*, 241 F.3d at 507 (establishing State taxpayer standing test akin to that for municipal taxpayer standing). The panel's reasoning, moreover, necessarily determined that none of this Court's seminal taxpayer standing cases from the last four decades, including *Flast*, *Valley Forge Christian College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), *Bowen v. Kendrick*, 487 U.S. 569 (1988), *Cuno*, and *Hein* was controlling on the issue of State taxpayer standing in Establishment Clause cases.

Perhaps recognizing the discord between its principal holding and this Court's precedents, the panel then reasoned that even if the *Flast* "legislative enactment" nexus requirement did apply to State taxpayers, Respondents would still have standing, as they had purportedly "demonstrated a nexus between Kentucky and its impermissible funding of a pervasively sectarian institution." *Id.* at 732-33, App. 22-23 (citing *Ams. United for Separation of Church & State v. Sch. Dist. of City of Grand Rapids*, 718 F.2d 1389 (6th Cir. 1983), without noting its overruling by

Agostini v. Felton, 521 U.S. 203, 236 (1997)). In support of this finding, the panel cited Respondents' reference to "Kentucky statutory authority [the executive enabling and licensing legislation, App. 55-74], legislative citations acknowledging KBHC's participation [the 2006 Kentucky House of Representatives' "thank you," App. 80-81], and specific legislative appropriations to KBHC [the 2005 school construction, App. 75-77]." *Id.* at 732, App. 23. The panel thus reversed the District Court's dismissal of Respondents' State taxpayer Establishment Clause claims and remanded the case for further proceedings. *Id.* at 734, App. 26.

Petitioners' petition for rehearing and rehearing *en banc* was denied without opinion or dissent on December 16, 2009.

Petitioners' motion for stay of mandate was filed on December 23, 2009, and remains pending before the author of the panel opinion.

REASONS TO GRANT THE PETITION

This case presents a rare opportunity for the Court to resolve an acknowledged circuit conflict over the federal courts' Constitutional authority to oversee executive State agencies at the behest of their taxpayers. Because this conflict implicates several issues of enduring national importance, including the scope of the federal judicial power, federalism, the funding of America's social service providers, taxpayer rights,

and church-state relations, Petitioners' petition presents truly compelling reasons for certiorari, and should be granted.

I. THE PANEL DECISION CREATES AN ACKNOWLEDGED CIRCUIT CONFLICT REGARDING ARTICLE III TAXPAYER STANDING.

A. Article III Standing Is Critically Important to a Limited Federal Judiciary.

Litigants invoking the federal courts' jurisdiction must establish, *inter alia*, standing to sue. U.S. Const., art. III, § 2, *Valley Forge*, 454 U.S. at 471. The importance of Article III standing cannot be overstated; without it, a federal court may not act in any capacity, much less adjudicate the fiscal affairs of a sovereign State. Indeed, this Court emphatically reaffirmed as much last Term, explaining that:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. *Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action.* [. . .] The doctrine of standing is one of several doctrines that reflect this fundamental limitation.

Summers v. Earth Island Inst., 129 S.Ct. 1142, 1148-49 (2009) (citations omitted) (emphasis added).

Taxpayer standing, moreover, is the single most restrictive path into federal court. To ensure federal courts do not exceed Article III and infringe on the political branches of government, this Court has repeatedly warned the lower courts to apply its narrow taxpayer standing exception rigorously. *See, e.g., Valley Forge*, 454 U.S. at 481, *Hein*, 551 U.S. at 609. As federal courts regularly enforce constitutional rights incorporated through the Fourteenth Amendment to the States, including those protected by the Establishment Clause, those courts must proceed with particular caution out of deference to their limited jurisdiction, and to avoid imposing more onerous federal constitutional obligations on the States than those applied to the federal government itself.

Unsurprisingly, given the paramount importance of subject matter jurisdiction, this Court has not hesitated to grant certiorari whenever jurisdictional questions come before the Court, even if the merits of the case have yet to be decided. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88-89 (1998) (jurisdiction is "a threshold question that must be resolved in [Respondents'] favor before moving to the merits."); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 430-31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining it has jurisdiction over the category of claim in suit (subject-matter

jurisdiction) and the parties (personal jurisdiction)."). In fact, in *Cuno*, this Court reversed the Sixth Circuit *sua sponte* on Article III standing grounds following that Circuit's erroneous reversal of the District Court's dismissal of the suit at the pleading stage. 574 U.S. at 354. By all accounts, Article III standing and its jurisdictional consequences are considerations of the highest order.

B. An Acknowledged Circuit Conflict Exists Between the Sixth and Seventh Circuits on Taxpayer Standing, Deepening an Intractable Rift with Several Other Circuits.

Article III standing, like any jurisdictional element, must be analyzed and applied in a uniform, straightforward manner throughout the federal courts. *See Hertz Corp. v. Friend*, No. 08-1107 at 16 (slip op.), ___ S.Ct. ___ (2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case."). No such uniformity exists on the applicable test for State taxpayer standing in Establishment Clause cases. In fact, the court below openly acknowledged that its State taxpayer standing test derived from its own precedent conflicted with that adopted by the Seventh Circuit derived from this Court's precedents.

Here, after employing the *Flast* "legislative enactment" nexus test to determine the Respondents lacked federal taxpayer standing, the Sixth Circuit

declined to use *Flast* when analyzing the Respondents' State taxpayer standing. *Cf.* 579 F.3d at 729-31, App. 15-18, with *id.* at 731-33, App. 21-22. Observing that "very few cases have dealt with State taxpayer standing as it relates to the Establishment Clause,"[5] the Sixth Circuit deemphasized recent decisions of this Court equating federal and State taxpayer standing, opting instead to adhere to *dicta* in *Johnson v. Econ. Dev. Corp. of the County of Oakland,* a Sixth Circuit panel decision which used a State taxpayer standing test akin to that used in municipal taxpayer standing cases. *Id.* at 732, *citing* 241 F.3d at 507. Using this relaxed standard, the Court of Appeals concluded Respondents suffered a "good-faith pocketbook injury," and thus had State taxpayer standing. 579 F.3d at 733.

The Sixth Circuit's refusal to equate federal and State taxpayer standing analyses conflicts with the precedent of the Second, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits. *Bd. of Educ. v. N.Y.S. Teachers Retirement Syst.*, 60 F.3d 106, 109-111 (2nd Cir. 1995); *Henderson v. Stalder*, 287 F.3d 374, 380-81 n.7 (5th Cir. 2002); *Hinrichs*, 506 F.3d at 598; *Booth v. Hvass,* 302 F.3d 849, 851-53 (8th Cir. 2002); *Am. United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 420 (8th

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[5] *But see Flast*, 392 U.S. at 102-03 (equating federal and State taxpayer standing). *See also Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983) (adopting Eighth Circuit ruling that State taxpayer had standing by establishing the *Flast* legislative nexus, 675 F.2d 228, 231 (8th Cir. 1982)).

Cir. 2007); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 796-97 (9th Cir. 1999); *Arakaki v. Lingle*, 477 F.3d 1048, 1061-66 (9th Cir. 2007); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1280 (11th Cir. 2008); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167-69 (1972). The Sixth Circuit partially acknowledged this split, noting with disapproval that in *Hinrichs* the Seventh Circuit had "required a demonstration of [*Flast*] legislative enactment nexus for state taxpayer standing[.]" 579 F.3d at 732. The Court of Appeals, however, made no effort to distinguish or explain away *Hinrichs*, and did not address any of the other appellate decisions cited, *supra*.

No doubt mindful of the circuit split it was creating, the panel then conducted an alternative State taxpayer standing analysis purportedly using the *Flast* test, and concluded the Respondents also had State taxpayer standing under that test. 579 F.3d at 732-33. In reaching this conclusion, however, the Court of Appeals materially mischaracterized *Flast*, and considered much broader types of legislative activity than that permitted by *Flast* and *Hein*. The legislative activities relied upon by the Sixth Circuit were also much broader than those considered permissible by the Seventh and Eighth Circuits in light of *Hein*. *See Hinrichs*, 506 F.3d at 598-600 ("[I]t is the *appropriation* of those [State] funds for the allegedly unconstitutional purpose that provides the link between taxpayer and expenditure necessary to support standing.") (emphasis added); *Prison*

Fellowship Ministries, 509 F.3d at 420 ("In this case, the Iowa legislature made *specific appropriations* from public funds to [a faith-based program for inmates]. . . . [t]herefore, [Plaintiffs] satisfy the narrow exception for taxpayer standing.") (emphasis added).

In fact, the Sixth Circuit considered dispositive the very type of legislative actions that had been utilized by the Sixth and Seventh Circuits to find taxpayer standing in *Cuno* and *Hein*, respectively, which were then rejected as insufficient by this Court. *See Cuno*, 547 U.S. at 349-50 (*sua sponte* reversal of Sixth Circuit) (finding legislative conduct lacking even in lenient *municipal* standing analysis); *Hein*, 551 U.S. at 603-09 (reversal of Seventh Circuit). Thus, in seeking to mitigate or assuage the split caused by its principal State taxpayer standing holding, the Sixth Circuit created a second issue on which it differs markedly from its sister circuits and this Court. Because these splits result in a significant "fail[ure] to achieve a nationally uniform interpretation" of the federal judicial power vis-à-vis the States, this Court should grant certiorari and resolve the conflicts. *Hertz*, No. 08-1107 at 13 (slip op.).

II. THE PANEL DECISION UNDERMINES THIS COURT'S RECENT TAXPAYER STANDING CASES.

In an effort to follow its own circuit precedent, the Sixth Circuit minimized the import of both *Cuno*

and *Hein*. The result is an appellate court analysis nearly identical to that overturned in those two cases. Granting certiorari would give the Court an opportunity to elucidate the scope of these important taxpayer standing decisions in the context of State taxpayer Establishment Clause challenges.

A. The Panel Decision Undermines *Cuno* and the Equivalence of State and Federal Taxpayer Standing In Establishment Clause Challenges.

First, this Court should decide whether this Court's unanimous *Cuno* decision, a non-Establishment Clause case, permits the use of different standing tests for federal and State taxpayers in Establishment Clause cases. While this Court has equated federal and State taxpayer standing for decades, *see Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952), *Flast*, 392 U.S. at 102-03, *Moose Lodge*, 407 U.S. at 167-69, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989) (Kennedy, J.) ("[W]e have likened state taxpayers to federal taxpayers" for purposes of taxpayer standing), that question seemed definitively settled by *Cuno*. There, after discussing the general considerations barring federal taxpayer standing, this Court unequivocally proclaimed that "[t]he foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers." 547 U.S. at 345. *See also* 547 U.S. at 354 (Ginsburg, J., concurring in relevant part) ("*Frothingham* [*v. Mellon*,

262 U.S. 447 (1923)] held nonjusticiable a federal taxpayer's suit challenging a federal spending program. *Doremus* applied *Frothingham*'s reasoning to a state taxpayer's suit.") (citations omitted).

The *Cuno* Court then turned its attention to the plaintiffs' argument that they had State taxpayer standing[6] by operation of the *Flast* test. *Id.* at 347-49. Importantly, this Court applied the *Flast* test in *Cuno*, but found the plaintiffs had not satisfied the second prong of that test, requiring an allegation that Ohio had exceeded a specific constitutional limitation imposed upon the exercise of the legislative taxing and spending power. Specifically, this Court rejected the plaintiffs' attempt to analogize the Commerce Clause to the Establishment Clause. *Id.* at 347-48 ("Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Article I, § 8, plaintiff's reliance on *Flast* is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to 'contribute three pence . . . for the support of any one [religious] establishment.'") (citation and quotation omitted). Thus, while applying the *Flast* test to State taxpayers, this Court found it unnecessary to decide whether the *Flast* "legislative enactment" nexus requirement was met by the Ohio franchise tax credits under review, as the need for

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[6] The *Cuno* plaintiffs "principally claim[ed] standing by virtue of their status as Ohio taxpayers[.]" *Id.* at 342.

that determination was moot. *Id.* The unanimous *Cuno* court did not suggest that any element of the *Flast* test was inapposite simply because the plaintiffs appeared as State taxpayers. Indeed, this Court had unmistakably equated federal and State taxpayer standing just a few pages earlier.[7]

Accordingly, the Sixth Circuit's bifurcation of standing tests for State and federal taxpayers, possible only through a cramped reading of *Cuno*, presents a compelling reason for further review. The Sixth Circuit's observation that "the Supreme Court did not apply the *Flast* nexus requirement in [*Cuno*]" and "no Supreme Court ... case has applied the [*Flast*] nexus test to analyze state taxpayer standing" denotes a material misapprehension of *Cuno*'s analysis. 579 F.3d at 732. Given *Cuno*'s heavy reliance on Establishment Clause jurisprudence, and given the wealth of precedent otherwise equating State and federal taxpayer standing – including several decisions of this Court and several sister circuit courts which found nothing controversial in citing

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[7] The Sixth Circuit decision below expressly acknowledged this Court's history of equating the two types of taxpayer standing. 579 F.3d at 732 ("Noting that no Supreme Court or Sixth Circuit case has applied the [*Flast* legislative enactment] nexus test to analyze state taxpayer standing, *even while discussing the similarities of the two analyses*, we decline to find that *Hein* overrules our precedent that specifically instructs that nexus [sic] is *un*necessary in state taxpayer cases.") (emphasis added).

Cuno for this very proposition[8] – an important question for *certiorari* exists as to whether *Cuno*'s analysis extends to State taxpayers in Establishment Clause cases.

B. The Panel Decision Undermines *Flast*, *Hein*, and the Contours of the "Legislative Enactment" Nexus In State Taxpayer Establishment Clause Challenges.

Second, this Court should address the scope of the *Flast* test, as illuminated by *Hein*, when applied to the States and their taxpayers. In its alternative State taxpayer standing analysis, the Sixth Circuit overstated the *Flast* "legislative enactment" nexus test and considered State legislative activity beyond that considered in *Flast* or *Hein* – after rejecting *federal* taxpayer standing a few pages earlier through a conventional *Flast* analysis. Thus, this Court should determine not only whether *Flast* applies to State taxpayers, but the extent to which it applies.

The first prong of the *Flast* test requires a taxpayer to identify an express legislative funding authorization or appropriation that itself violates the Establishment Clause. *Flast*, 392 U.S. at 102-03, *Hein*, 551 U.S. at 605. Taxpayer standing can arise from an executive disbursement only when those funds are spent pursuant to an express statutory

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[8] *See Hinrichs*, 506 F.3d at 598; *Arakaki*, 477 F.3d at 1061-66; *Prison Fellowship Ministries*, 509 F.3d at 420.

mandate. *See id.* at 607 (describing how taxpayers in *Bowen v. Kendrick* achieved standing under *Flast* test). The Sixth Circuit, however, required only that Respondents identify some "link" between the Commonwealth of Kentucky (but not necessarily its legislature or its legislation) and ultimate payments to a religiously affiliated institution, subtly but dramatically broadening that prong of *Flast*. *See* 579 F.3d at 732-33, App. 22-23 ("[T]he plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution.").

To arrive at this characterization of the *Flast* "legislative enactment" requirement, the Court of Appeals understated the import of *Hein*, finding that this Court "did not change the standards for standing" and "explicitly refused to alter the standards for taxpayer standing" in that case. 579 F.3d at 731 n.4. This interpretation unduly minimizes *Hein*'s powerful effect on Establishment Clause taxpayer standing jurisprudence within the *lower* federal courts. *See Hinrichs*, 506 F.3d at 599 ("Although the Supreme Court's [*Hein*] plurality characterized its opinion as effecting no change in *its* view of taxpayer standing, the plurality's decision, especially when read with *Cuno*, clarified significantly the law of taxpayer standing for the lower federal courts.") (emphasis original). While the *Hein* court did decline to overrule *Flast* – thus "leav[ing *Flast*] as [the Court] found it" – its plurality opinion clearly intended to retrench the *Flast* "nexus" test as a bright-line matter

of express legislative enactment, and in that respect significantly impacted the taxpayer standing paradigms used by the lower federal courts.[9] *See also Hein*, 551 U.S. at 637-43 (Souter, J., dissenting) (explaining view that fundamental change was wrought by *Hein* plurality opinion).

Hein's effect can be measured by comparing the Seventh Circuit taxpayer standing decision that was overturned in *Hein* (*Freedom From Religion Foundation, Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006)) with the Seventh Circuit's post-*Hein* taxpayer standing decision – *Hinrichs*.[10] The *Hein* Court rejected the "broad reading" of the *Flast* test presented by *Chao* – and replicated by the Sixth Circuit here – observing that the Seventh Circuit had "failed to observe 'the rigor with which the *Flast* exception . . . ought to be applied.'" 551 U.S. at 603, citing *Valley Forge*, 454 U.S. at 481.

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[9] Even the Sixth Circuit acknowledged as much in *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 284-87 (6th Cir. 2009), observing that "*Hein* ma[de] clear" that the *Flast* exception does not permit standing for claims "challenging executive-branch expenditures of unearmarked funds." *Id.* at 285-86.

[10] Strikingly, in *Chao*, Circuit Judge Ripple wrote in dissent that the majority's "approach, while possessing an initial appeal, simply cuts the concept of taxpayer standing loose from its moorings." 433 F.3d at 998. Later, vindicated by *Hein*, Judge Ripple authored the *Hinrichs* decision.

After adopting *Flast* "legislative enactment" nexus parameters beyond those permitted in *Hein*, the Sixth Circuit considered Kentucky legislative activity beyond that permitted by *Flast*, *Hein*, and other decisions of this Court. *Flast* held that a "taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution." 392 U.S. at 101-03. In *Hein*, this Court subjected the plaintiff's claims to particularly exacting scrutiny on this point:

> The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. *Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional.* That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. *These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain.* Those expenditures resulted from executive discretion, not congressional action. *We have never found taxpayer standing under such circumstances.*

551 U.S. at 605 (emphasis added).

The *Hein* Court found, moreover, that *Bowen v. Kendrick* could not be used to justify a departure from this explicit link between legislative enactment and constitutional violation. *Id.* at 606-07. The *Hein* Court determined that the key to this Court's conclusion in *Bowen* was an express statutory mandate requiring the executive branch to spend certain funds in an allegedly unconstitutional manner. The *Bowen* statute "not only *expressly authorized and appropriated* specific funds for grant-making, it also *expressly contemplated* that some of those moneys might go to projects involving religious groups." *Id.* (emphasis added). Finally, the *Hein* Court took special care to distinguish between express statutory language and other, more nebulous forms of legislative activity and "awareness." *See id.* at 608 n.7 (citing *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)).

The Sixth Circuit's brief summary of the Kentucky legislative activity here, however, unfolds as if the discussion from *Hein* outlined above is wholly irrelevant to State taxpayers (which, in fact, the Sixth Circuit had held in its earlier principal ruling). Respondents' Establishment Clause claim is based on the alleged maladministration of reimbursement contracts between Kentucky executive branch agencies and KBHC *that are not required by any statute*. The Kentucky General Assembly (and, indirectly, Congress) generally appropriated funds to two Kentucky executive branch agencies for unrestricted child care purposes. These agencies, in turn, had unfettered discretion to spend these funds

on child care in whatever manner they deemed appropriate – including, but not limited to, direct government child care programs, contracts with private secular child care providers, contracts with religiously affiliated private child care providers besides KBHC, or contracts with KBHC, the sole provider targeted in this suit. The agencies freely chose to contract with KBHC for after-the-fact, post-audit, secular child care services.

Respondents' Establishment Clause claim is *not* based upon a "commendation" passed by one house of the Kentucky legislature six years after the complaint was filed evidencing "awareness," (App. 80-81) or a single brick and mortar appropriation for classrooms made five years after the complaint was filed (App. 75-77). Respondents' claim does *not* challenge the constitutionality of enabling statutes permitting Kentucky executive branch agencies to spend money on child care generally (App. 61-62, 63, 72-74), or regulatory statutes setting forth requirements for a child care license in the Commonwealth (App. 55, 56-59, 62, 64-72). The purportedly unconstitutional contract administration is wholly separate from these legislative actions. The Sixth Circuit did not explain, as *Flast* and *Hein* anticipate, how the legislative activity cited to establish standing (App. 55-74, 75-77, 80-81) actually violates the Establishment Clause (or how any relief associated with those unchallenged provisions would redress alleged violations arising from the executive contracts). Nor did it explain how a taxpayer's standing can be premised upon one set of

government activities (legislative commendation, school appropriation, enabling and regulatory statutes, App. 55-74, 75-77, 80-81) while the taxpayer's claim on the merits is based on another (KBHC's child care reimbursement contracts, App. 114-125). Such a conclusion cannot be explained because this reasoning was expressly rejected in *Cuno*. 547 U.S. at 350-52 (reversing Sixth Circuit on this very point).

The Sixth Circuit's alternative application of the *Flast* test to State taxpayer standing closely tracks the Seventh Circuit's analysis in *Chao* that was rejected in *Hein*. This Court should grant review to determine the appropriate scope of the *Flast* test when applied to State legislatures and State taxpayers, and whether the Sixth Circuit's approach here falls within those parameters.

III. THE PANEL DECISION DISRUPTS FUNDAMENTAL PRINCIPLES OF FEDERALISM.

Opening wide the federal courthouse doors for Establishment Clause challenges against States, but not the federal government, would have significant recurring effects on the relationships between the federal government, the States, and the States' taxpayers.

A. Congress and the State Legislatures Should Not Be Treated Differently Under the First Amendment.

The Sixth Circuit's decision to forego the *Flast* test for a less restrictive State taxpayer standing test necessarily implies that the Establishment Clause applies more onerously to the States – or at least the four States within the Sixth Circuit – than to the federal government itself. If the Establishment Clause applies uniformly to the federal and State governments, and federal and State taxpayers share the same status vis-à-vis their sovereigns for standing purposes, the violation of a State taxpayer's Establishment Clause rights should result in the same quality of Article III standing "injury" as that of a federal taxpayer – and thus require the same test to determine standing to seek redress for that injury. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947) (incorporating Establishment Clause to States), *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983) (Establishment Clause applies equally to State and federal governments), *Cuno,* 547 U.S. at 345 (equating federal and State taxpayer standing). The State taxpayer standing test adopted by the Sixth Circuit, however, relies on a case equating States to municipal corporations, and implicitly concludes – based solely on circuit *stare decisis* – that the federal courts should regard a State's Establishment Clause violation as a more tangible injury to its respective taxpayers than those perpetrated by the federal

government. 579 F.3d at 732-33 (*citing Johnson*, 241 F.3d at 507-09).

This novel conclusion deserves the Court's full attention. "In applying the First Amendment to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government." *Marsh*, 463 U.S. at 790-91. Likewise, it would be incongruous for the federal judiciary – courts of limited, express jurisdiction – to have *greater* opportunity for Establishment Clause enforcement over all three branches of independent, sovereign State governments than they have over co-equal branches of the federal government. Indeed, an Establishment Clause violation by a State should arguably result in a *lesser* Article III taxpayer injury, and thus a more restrictive standing test. That Clause is only applied to the States through the Fourteenth Amendment, and virtually every State (including Kentucky) already extends its citizens similar, if not more expansive, rights under its own constitution that are fully enforceable in the State's own courts of plenary jurisdiction. *See, e.g.*, Ky. Const. § 5 (providing rights greater than those protected by federal Establishment Clause).

This Court, moreover, has previously held that States have special "dignitary interests" as separate sovereigns that counsel prudence in the imposition of federal litigation. *See Puerto Rico Aqueduct and*

Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 146 (1993). As part of "the federal structure of the original Constitution itself," *Alden v. Maine*, 527 U.S. 706, 728-29 (1999), Article III, much like the Eleventh Amendment, "serves to avoid the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties[.]" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (*citing Metcalf & Eddy, supra*). The Court should explore the juxtaposition of the Sixth Circuit's State taxpayer standing test and these important federalism considerations in greater depth.

B. The Panel Decision Jeopardizes the Federal-State Social Services Funding System.

The Sixth Circuit's State taxpayer standing test, furthermore, would inevitably subject the massive social services funding system among the federal government, the States and private providers to unending federal court challenges.

A principal component of the nation's fiscal affairs is the federal government's use of the "power of the purse" to persuade States to implement various public policy objectives, including the provision of social services. In 2009, the federal government provided $538 billion to State and local governments for a variety of purposes, representing approximately 15% of the federal government's total annual outlays. *See* U.S. Office of Management and Budget, Budget of

the United States, Historical Tables, Tables 1.1 and 12.2, *available at* http://www.whitehouse.gov/omb/budget/historicals (last visited 3/9/10). $74 billion of this amount was budgeted for "education, training, employment, and social services." *Id.* at Table 12.2.

State executive agencies are the recipients of the vast majority of this assistance. *See, e.g.*, "Federal Assistance from Department of Health and Human Services, FY 2009, List of Recipients," *available at* http://www.usaspending.gov/faads (last visited 3/9/10) (search criteria: "By Agency" – Health and Human Services, Fiscal Year 2009, "Low" level of detail). Not surprisingly, federal assistance comprises a critical percentage, if not an outright majority, of many State social services agencies' available budget funds. For example, in 2009, Petitioner Cabinet for Health and Family Services's Department for Community Based Services (the sub-agency that contracts with KBHC) received $533.3 million in federal assistance, constituting 51% of its total funding. 2008-10 Budget of the Commonwealth, Operating Budget, Volume I, Part C, p. 315, *available at* http://www.osbd.ky.gov/Archives/buddocs.htm (last visited 3/9/10). The nation's private social service agencies, in turn, often depend on State and federal pass-through assistance for the financial wherewithal to care for needy citizens.

A lenient State taxpayer standing test all but ensures that these State-implemented social services, and the billions in State and federal pass-through funding supporting these services, will always be

susceptible to protracted second-guessing by State taxpayers invoking federal jurisdiction through Establishment Clause litigation. The potential defendants are perpetual (the fifty States), the potential taxpayer plaintiffs number in the hundreds of millions, and the alleged taxing and spending "injuries" renew on an annual or biannual basis at the very least.[11] A State executive agency's decision to engage a religiously affiliated service provider, no matter how benign, could easily be challenged by any of its taxpayers and scrutinized through years of litigation. The States' social services policies and the federal government's funding objectives would inevitably be affected through attrition. Private social service agencies like KBHC would be subject to both the direct costs of Establishment Clause litigation and the indirect threat of being jettisoned by States wary of more lawsuits. Ultimately, the negative effects of easy taxpayer suits would be felt by the needy citizens and wards whom all of these institutions are designed to help.

Given the size of the potential taxpayer plaintiff class, and the disruption their lawsuits could wreak on the States and their social services providers, it is essential that the parameters of that class be

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[11] Unlike municipalities, States conduct a much greater scope of activities via plenary police powers with considerably greater resources over a greater number of citizens, and are thus much more susceptible to interference should a less stringent standing test be adopted, or left undefined.

carefully prescribed to ensure the national social services system can function as intended. The Court should grant certiorari to consider these issues thoroughly.

C. The Panel Decision Permits Taxpayers to Circumvent Flast's Requirements Where Federal Pass-Through Funds Are At Issue.

Furthermore, the ubiquity of federal pass-through assistance to States, coupled with a divergence in federal and State taxpayer standing tests, would create an obvious loophole for Establishment Clause taxpayer plaintiffs. No longer would such taxpayers have to meet the narrow, stringent *Flast* "legislative enactment" test to challenge a federal expenditure; instead, such taxpayers need only wait until federal dollars are passed through to and ultimately "re-spent" by a State before suing. A more lenient State taxpayer standing threshold thus provides potential plaintiffs with a strong incentive to circumvent *Flast* and its progeny whenever the case involves federal pass-through funds, undermining Article III and this Court's precedent and unduly shifting the litigation costs and potential liability for federal Establishment Clause violations to the States. These inevitable outcomes, wholly inconsistent with the intent of Article III and the Establishment Clause, justify certiorari as a means of ensuring the integrity of this Court's Article III jurisprudence.

IV. THE PANEL DECISION UNNECESSARILY AND ERRONEOUSLY INTRODUCES THE PERVASIVELY SECTARIAN CONCEPT AS AN ARTICLE III STANDING CONSIDERATION.

Finally, this Court's full review is necessary to consider the Sixth Circuit's unprecedented introduction of the "pervasively sectarian" concept as a new factor in Article III taxpayer standing analyses.

The continuing viability of the pervasively sectarian theory in the Establishment Clause context is an open question. In *Mitchell v. Helms*, 530 U.S. 793 (2000), six members of this Court concluded that a public funding recipient's religious character was irrelevant to the merits of an Establishment Clause challenge to that government funding. *See id.* at 829 (plurality op. of Thomas, J.); *see also id.* at 857-60 (concurring op. of O'Connor, J., joined by Breyer, J.). While some circuits have interpreted *Mitchell* as the death knell of the pervasively sectarian rubric, *see, e.g., Columbia Union College v. Oliver*, 254 F.3d 496, 502-04 (4th Cir. 2001) and *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1258-59 (10th Cir. 2008), the Sixth Circuit has been more reticent, choosing to wait until a clear majority of this Court overtly discards that locution. *See American Atheists*, 567 F.3d at 296, *Steele v. Indust. Dev. Bd. of Metro. Gov't Nashville*, 301 F.3d 401, 408-09 (6th Cir. 2002).

This Court need not resolve this substantive Establishment Clause question here, however. Instead,

it need only consider whether a service provider's alleged sectarian nature (*i.e.*, religious affiliation, belief, nature, practices, etc.) is relevant to whether a taxpayer has Article III standing to challenge that provider's State government contract. Here, after describing the various Kentucky legislative activities presented by Respondents, *supra*, the Sixth Circuit found that "[t]hrough these specifications, [Respondents] have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a *pervasively sectarian* institution." 579 F.3d at 732 (emphasis added). The Sixth Circuit then cited with approval *City of Grand Rapids*, 718 F.2d at 1416, without noting that case's overruling by *Agostini*, 521 U.S. at 236.

The pervasively sectarian concept was embraced by earlier Establishment Clause decisions of this Court as a shorthand to define *recipients* of public funding (e.g., religiously affiliated schools) whose secular and religious functions were inextricably intertwined. *Zelman v. Simmons-Harris*, 536 U.S. 639, 692 (2002), *citing Roemer v. Bd. of Public Works of Md.*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *see also Columbia Union College v. Clarke*, 527 U.S. 1013, 119 S.Ct. 2357, 2357-58 (1999) (denying certiorari) (dissenting op. of Thomas, J.) ("We invented the 'pervasively sectarian' test as a way to distinguish between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and

therefore require religion to permeate all activities."). "Direct aid" from the government to a pervasively sectarian entity was presumed to be used for religious purposes, and was thus determined to violate the Establishment Clause. *Zelman*, 536 U.S. at 691-92. Accordingly, even in its heyday, this test was only used by this Court to analyze the merits of an Establishment Clause claim brought by a plaintiff who already possessed Article III standing to sue.

Article III standing, however, has always been a *plaintiff*-focused inquiry. As this Court recently restated in *Summers*:

> The doctrine of standing is one of several doctrines that reflect this fundamental [Article III "case" or "controversy"] limitation. It requires federal courts to satisfy themselves that *the plaintiff* has alleged such a *personal stake* in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction. *He* bears the burden of showing that *he* has standing for each type of relief sought. To seek injunctive relief, a plaintiff must show that *he* is under threat of suffering injury in fact that is concrete and particularized; the threat must be actual or imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

129 S.Ct. at 1149 (citations and quotations omitted) (emphasis added). Similarly, *Flast* ensured taxpayer

standing would exist only when a plaintiff's claimed injury (an Establishment Clause violation) was closely linked to *his or her status as a taxpayer*. 392 U.S. at 102-03. There is no other context where the character of the defendant is used to determine the plaintiff's standing.

Thus, the alleged sectarian nature of KBHC or any other service provider receiving government funds provides *no* insight about the injury caused *to the taxpayer plaintiff* by a legislature's taxing and spending authority. That information does not assist in determining whether the *Flast* "legislative enactment" nexus is satisfied, nor does it even indicate whether the government engaged in "measurable appropriations" or suffered a "loss in revenue." It cannot be the law that the Respondents have standing as taxpayers if KBHC is pervasively sectarian, but do not have standing if it is only sectarian.

The consideration of these sectarian criteria only serves to discriminate against religiously affiliated providers in ways this Court has previously condemned. *See Mitchell*, 530 U.S. at 829 ("In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian [entities] from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, borne of bigotry, should be buried now.") (plurality op. of Thomas, J.). Given the already tenuous position of the pervasively sectarian notion, Petitioners believe

this Court should give careful consideration to that idea before introducing it into Article III analyses.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2010

United States Court of Appeals,
Sixth Circuit.

Alicia M. PEDREIRA; Karen Vance; Paul Simmons; Johanna W.H. Van Wijk-Bos; and Elwood Sturtevant, Plaintiffs-Appellants,

v.

KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; Ishmun F. Burks, Secretary of the Commonwealth of Kentucky Justice and Public Safety Cabinet; and Janie Miller, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services, Defendants-Appellees.

No. 08-5538.

Argued: March 11, 2009.
Decided and Filed: Aug. 31, 2009.
Rehearing and Rehearing En Banc Denied Dec. 16, 2009.

ARGUED: Alexander Joseph Luchenitser, Americans United For Separation Of Church and State, Washington, D.C., for Appellants. Jonathan David Goldberg, Goldberg Simpson, LLC, Louisville, Kentucky, John O. Sheller, Stoll Keenon Ogden PLLC, Louisville, Kentucky, for Appellees. **ON BRIEF:** Alexander Joseph Luchenitser, Ayesha N. Khan, Americans United for Separation of Church and State, Washington, D.C., David B. Bergman, Elizabeth Leise, Alicia A.W. Truman, Joshua P. Wilson, Arnold & Porter LLP, Washington, D.C., Kenneth Y. Choe, James D. Esseks, American Civil Liberties Union Foundation, New York, New York, David A. Friedman, William E. Sharp, American Civil Liberties

Union of Kentucky, Louisville, Kentucky, Daniel Mach, American Civil Liberties Union Program On Freedom of Religion & Belief, Washington, D.C., for Appellants. Jonathan David Goldberg, Goldberg Simpson, LLC, Louisville, Kentucky, John O. Sheller, Jeffrey A. Calabrese, Stoll Keenon Ogden PLLC, Louisville, Kentucky, Patrick T. Gillen, Ann Arbor, Michigan, Timothy J. Tracey, Center For Law & Religious Freedom, Springfield, Virginia, LaDonna Lynn Koebel, Joshua C. Billings, Commonwealth of Kentucky, Frankfort, Kentucky, for Appellees. Steven W. Fitschen, The National Legal Foundation, Virginia Beach, Virginia, Edward L. White III, The American Center for Law & Justice, Ann Arbor, Michigan, for Amici Curiae.

Before: CLAY and GIBBONS, Circuit Judges; GREER, District Judge.*

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Plaintiffs-appellants Alicia M. Pedreira, Karen Vance, and several Kentucky taxpayers[1] appeal the district court's dismissal of their claims against defendants-appellees Kentucky Baptist Homes for

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* The Honorable J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

[1] On appeal, the taxpayers are Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant.

Children, Inc. ("KBHC"); Ishmun F. Burks, Secretary of the Commonwealth of Kentucky Justice and Public Safety Cabinet; and Janie Miller, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services.[2] Pedreira and Vance brought suit against KBHC for its policy of firing and not hiring gay and lesbian employees, alleging discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Kentucky Civil Rights Act, and the plaintiffs brought suit against all defendants for violations of the Establishment Clause of the First Amendment. The United States District Court for the Western District of Kentucky granted KBHC's motion to dismiss the employment discrimination claims and, in a subsequent order, dismissed the plaintiffs' First Amendment claims against all defendants because it concluded that the plaintiffs did not have standing.

For the reasons that follow, we affirm the dismissal of the plaintiffs' employment discrimination claims, but we reverse the dismissal of the plaintiffs'

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[2] The plaintiffs originally sued Robert Stephens in his official capacity as the Secretary for the Commonwealth of Kentucky Justice Department and Viola P. Miller in her official capacity as the Secretary for the Commonwealth of Kentucky Cabinet for Families and Children. The Cabinet for Families and Children has since been merged with the Cabinet for Health Services to create the Cabinet for Health and Family Services, and the Justice Department has become the Justice and Public Safety Cabinet. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Ishmun F. Burks and Janie Miller are automatically substituted for former Secretaries Stephens and Miller.

First Amendment claims and remand them for further proceedings.

I.

KBHC is funded by Kentucky for its participation in the "Alternatives for Children Program," which provides placement resources for children who have been, or are at risk of being, abused or neglected. In 1998, plaintiff Alicia Pedreira was terminated from her job as a Family Specialist at Spring Meadows Children's Home, a facility owned and operated by KBHC, when members of KBHC's management discovered a photograph at the Kentucky State Fair of Pedreira and her female partner at an AIDS fundraiser. Pedreira's termination notice indicated that she was fired "because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." After her termination, KBHC announced as official policy that "[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

Karen Vance is a social worker from the Louisville area. She would have applied for positions at KBHC, but because she is a lesbian, she felt that it was futile to apply due to KBHC's formal and well-publicized policy prohibiting gays and lesbians from employment. In 2000, Pedreira and Vance brought suit against KBHC alleging violations of Title VII and

the Kentucky Civil Rights Act in terminating and refusing to hire gay and lesbian employees.

This employment discrimination suit was consolidated with an action brought by Pedreira and Vance, joined by six Kentucky taxpayers,[3] against all defendants alleging violations of the Establishment Clause. The plaintiffs claimed that KBHC is a pervasively sectarian institution that uses state and federal funds for the religious indoctrination of children. According to the plaintiffs, KBHC has received more than $100 million in state government funds since 2000. KBHC acknowledges that it has received an average of $12.5 million per year from Kentucky over the last decade, bringing the amount to approximately $125 million. Drawing on legislative documents and budget reports, the plaintiffs contend that Kentucky, in particular the Secretaries of the Justice and Public Safety Department and the Cabinet for Health and Family Services, are aware that state money is funding religious indoctrination.

The plaintiffs presented the following evidence of KBHC's sectarian mission. In its annual report, KBHC's president announced: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made decisions about

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[3] The original taxpayer plaintiffs were Paul Simmons, Johanna W.H. Van Wijk-Bos, Elwood Sturtevant, Bob Cunningham, Jane Doe, and James Doe.

their relationships with Jesus Christ." He further committed resources to KBHC's religious goals: "[W]e are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families." In its news release, KBHC's president said that KBHC's "mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent." KBHC displays religious iconography throughout its facilities, leads group prayer before meals and during staff meetings, and requires its employees to incorporate its religious tenets in their behavior. Kentucky contracted with a private company to conduct reviews of KBHC's facilities. These reviews contain 296 interview responses from youth describing KBHC's religious practices as coercive.

The defendants filed a series of dispositive motions. The district court granted KBHC's motion to dismiss Pedreira's and Vance's claims of employment discrimination, finding that sexual orientation is not a protected class under either Title VII or the Kentucky Civil Rights Act and that Pedreira and Vance had failed to show that they had been discriminated against because of their refusal to comply with KBHC's religion. *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 186 F.Supp.2d 757, 762 (W.D.Ky.2001) ("*Pedreira I*"). The district court denied the defendants' motion for summary judgment on the

First Amendment allegations, finding that the plaintiffs had adequately asserted that funding to KBHC has the impermissible effect of advancing religion and therefore violates the Establishment Clause. *Id.* at 764. The district court denied the plaintiffs' motion for reconsideration. The plaintiffs filed interlocutory appeals for the dismissal of the employment discrimination claims, but the appeals were dismissed for lack of appellate jurisdiction. *Pedreira v. Ky. Baptist Homes for Children, Inc.*, No. 3:00-CV-210-S, 2007 WL 316992, at *1 (W.D.Ky. Jan. 29, 2007) ("*Pedreira II*").

In 2003, the defendants moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), challenging the plaintiffs' standing to bring allegations of violations of the Establishment Clause. The district court found that the plaintiffs had sufficiently alleged taxpayer standing and denied the defendants' motion. *Pedreira v. Ky. Baptist Homes for Children, Inc.*, No. 3:00-CV-210-S, slip op. at 3 (W.D.Ky. Apr. 16, 2003) ("*Pedreira III*"). The district court also permitted the plaintiffs to file an amended complaint. *Id.*

In 2006, after mediation was attempted and failed, the plaintiffs sought to file a second amended complaint, asserting that KBHC is a state actor and suggesting a new theory of recovery. *Pedreira II*, 2007 WL 316992, at *2. The district court denied the motion, finding that allowing the plaintiffs' amendment would cause prejudice to the defendants and an imposition on the court's resources. *Id.*

The parties then filed a new round of motions. The defendants submitted, *inter alia,* two subsequent motions to dismiss for lack of subject matter jurisdiction; the plaintiffs submitted, *inter alia,* another motion for leave to file a second amended complaint and a motion for a hearing on the motions. *Pedreira v. Ky. Baptist Homes for Children,* 553 F.Supp.2d 853, 854 (W.D.Ky.2008) (*"Pedreira IV"*). The district court found that the Supreme Court's recent opinion in *Hein v. Freedom From Religion Foundation, Inc.,* 551 U.S. 587, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007), narrowed taxpayer standing and granted the defendants' motion to dismiss for lack of standing that was previously denied. *Pedreira IV,* 553 F.Supp.2d at 856.

The plaintiffs appealed to this court. The National Legal Foundation and the American Center for Law & Justice submitted *amicus* briefs in support of the defendants.

II.

A. Employment Discrimination

We review a district court's grant of a motion to dismiss *de novo. See Mezibov v. Allen,* 411 F.3d 712, 716 (6th Cir.2005). We must construe the complaint in the light most favorable to the plaintiffs and accept all allegations as true. *See Harbin-Bey v. Rutter,* 420 F.3d 571, 575 (6th Cir.2005). However, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 555, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In considering a motion to dismiss, we generally look only to the plaintiffs' complaint. *See Winget v. JP Morgan Chase Bank, N.A.,* 537 F.3d 565, 576 (6th Cir.2008).

Pedreira brought suit against KBHC pursuant to the Kentucky Civil Rights Act ("KCRA"). Vance joined in the KCRA suit against KBHC and additionally alleged violations of Title VII. Vance claims that there are positions open at KBHC for which she is qualified, but she has not applied due to KBHC's policy against hiring gay and lesbian employees. However, Vance has not applied for the job and thus has not shown that her failure to be hired is due to her sexual orientation. Unlike Pedreira, Vance's injury is purely speculative as she has not carried her burden of showing "actions taken by the employer from which one can infer, if such actions remained unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under [Title VII or the KCRA].'" *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 576, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). She has not established standing to bring a Title VII or KCRA claim against KBHC, and we therefore analyze the employment discrimination claims with respect to Pedreira only. Because Pedreira brought a claim under the KCRA only, we dismiss all Title VII allegations against KBHC.

Because the purpose of the KCRA was "[t]o provide for execution within the state of the policies embodied in [Title VII]," Ky.Rev.Stat. § 344.020(1)(a), we apply Title VII precedent to assess Pedreira's claim under the KCRA. *See Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 434 (6th Cir.2009); *Smith v. Leggett Wire Co.*, 220 F.3d 752, 758 (6th Cir.2000). The parties do not dispute that the KCRA does not prohibit discriminatory acts based on an employee's sexual orientation. *See* Ky.Rev.Stat. § 344.040; *see also* 42 U.S.C. § 2000e-2(a)(1); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir.2006). The issue on appeal is whether the plaintiffs' claim is covered by the KCRA's prohibition against employment discrimination on account of religion. *See* Ky.Rev.Stat. § 344.040; *see* 42 U.S.C. § 2000e-2(a). Courts have interpreted the prohibition to preclude employers from discriminating against an employee because of the employee's religion as well as because the employee fails to comply with the *employer's* religion. *See, e.g., Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir.2000) (explaining that Title VII's scope "include[s] the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 708-09 (6th Cir.1985). Seizing on this latter interpretation, Pedreira argues that living openly as a lesbian constitutes not complying with her employer's religion. Pedreira claims that she was terminated because she does not hold KBHC's religious belief that homosexuality is sinful.

Both parties extensively briefed the issue of whether Pedreira established a *prima facie* case of discrimination. The defendants urge us to apply the traditional *McDonnell Douglas* framework to Pedreira's claim, while Pedreira argues that we should treat this case as similar to reverse race and sex discrimination cases and view the "protected class" inquiry as inapposite. *See Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir.2007) (finding the "protected class" element inapplicable for reverse religious discrimination claims); *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1038 (10th Cir.1993) ("Where discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief, the use of the protected class factor is inappropriate."). On a motion to dismiss, however, these arguments are premature. "The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Thus, "the ordinary rules for assessing the sufficiency of a complaint apply." *Id.* at 511, 122 S.Ct. 992; *see Lindsay v. Yates*, 498 F.3d 434, 439 (6th Cir.2007) (noting *Swierkiewicz*'s holding that "an employment-discrimination plaintiff satisfies her pleading burden by drafting a short and plain statement of the claim consistent with Federal Rule of Civil Procedure 8(a)." (internal quotation marks omitted)). We therefore look to see whether Pedreira has sufficiently pled "a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955.

It is undisputed that KBHC fired Pedreira on account of her sexuality. However, Pedreira has not explained how this constitutes discrimination based on *religion*. Pedreira has not alleged any particulars about her religion that would even allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with KBHC. "To show that the termination was based on her religion, [the plaintiff] must show that it was the *religious* aspect of her [conduct] that motivated her employer's actions." *Hall,* 215 F.3d at 627. Furthermore, Pedreira does not allege that her sexual orientation is premised on her religious beliefs or lack thereof, nor does she state whether she accepts or rejects Baptist beliefs. While there may be factual situations in which an employer equates an employee's sexuality with her religious beliefs or lack thereof, in this case, Pedreira has "failed to state a claim upon which relief could be granted." *Amadasu v. Christ Hosp.,* 514 F.3d 504, 506-07 (6th Cir.2008); *see Vickers,* 453 F.3d at 763 (dismissing a complaint of discrimination on the basis of sexual orientation for failure to state a claim under Title VII).

We therefore affirm the dismissal of Vance's and Pedreira's claims for violations of the KCRA.

B. Establishment Clause

1.

The threshold issue for the plaintiffs' First Amendment claims is whether they have standing,

defined as whether they have "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein,* 551 U.S. at 598, 127 S.Ct. 2553 (quoting *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). The plaintiffs have alleged standing as both federal and state taxpayers, both of which were denied by the district court. We review *de novo* a district court's determination of standing. *See Schultz v. United States,* 529 F.3d 343, 349 (6th Cir.2008). In reviewing a determination of standing, we consider the complaint and the materials submitted in connection with the issue of standing. *See Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The plaintiffs also appeal the district court's denial of their motion for leave to submit a second amended complaint and urge us to consider the information in their second amended complaint in determining standing. To the extent that the plaintiffs' second amended complaint contains new legal arguments and additional theories for recovery, the district court did not err in denying the plaintiffs' motion. Although district courts "should freely give leave [to a party to amend its pleadings] when justice so requires," Fed.R.Civ.P. 15(a)(2), district courts can exercise their discretion to deny a motion for leave to amend based on "undue delay, bad faith or dilatory motive . . . [or] futility of amendment." *Prater v. Ohio Educ. Ass'n,* 505 F.3d 437, 445 (6th Cir.2007) (quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9

L.Ed.2d 222 (1962) (alterations in original)). Noting that the case had been pending in district court for almost seven years when the plaintiffs sought to file a second amended complaint, the district court found undue delay and denied their motion. We find that the district court did not abuse its discretion in denying the plaintiffs' motion to the extent that it contained novel substantive arguments. *See Miller v. Admin. Office of Courts,* 448 F.3d 887, 898 (6th Cir.2006).

The district court also denied the plaintiffs' amendments clarifying their standing arguments. In determining standing, the district court properly considered the proposed amendments to the complaint "in order to ensure that [it] consider[ed] and addresse[d] fulsomely the standing arguments." *Pedreira IV,* 553 F.Supp.2d at 854-55. Finding that the proposed amendments still would not suffice to demonstrate standing, the district court denied the plaintiffs' motion for leave to amend their complaint. When a motion for leave is denied because the amended complaint would not withstand a motion to dismiss, we review the judgment of the district court *de novo* because the decision was based on a legal conclusion. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430, 437 (6th Cir.2008). In determining whether the district court correctly found that the plaintiffs' amendments were insufficient to establish standing, we will consider the plaintiffs' amendments in the second

amended complaint and the related exhibits as they relate to standing only.

(a.) Federal Taxpayer Standing

Generally, individuals lack standing when their only interest in the matter is as a taxpayer. *Frothingham v. Mellon,* 262 U.S. 447, 485-86, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). After forty-five years of "an impenetrable barrier" to taxpayer standing, the Supreme Court announced a narrow exception for the plaintiffs who could show that their alleged injury satisfies the following two-part test:

> First, the taxpayer must establish a logical link between that [taxpayer] status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, [§] 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally

> beyond the powers delegated to Congress by Art. I, [§]8.

Flast v. Cohen, 392 U.S. 83, 102-03, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The Supreme Court reaffirmed that individuals could not use their status as federal taxpayers to bring general grievances to court but held that taxpayers "will have standing consistent with Article III to invoke federal judicial power when [they] allege[ ] that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Id.* at 105-06, 88 S.Ct. 1942. In *Hein*, the Supreme Court confirmed that the nexus had to be between the taxpayer and a legislative action, clarifying that the exception articulated in *Flast* does not apply "to a purely discretionary Executive Branch expenditure." 551 U.S. at 615, 127 S.Ct. 2553. Nevertheless, taxpayers still have standing to challenge legislative disbursements over which agencies have executive discretion. *See Bowen v. Kendrick*, 487 U.S. 589, 618-19, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988).

The plaintiffs claim in their complaint that they have standing as federal taxpayers. In their amended complaint, they refer to the Kentucky statutes authorizing the funding of services such as KBHC. However, nowhere in the record before the district court did the plaintiffs explain what the nexus is between their suit and a *federal* legislative action. The district court found that the plaintiffs' allegations were more akin to those in *Hein*, which raised a

general Establishment Clause challenge to federal agencies' use of federal money to promote the President's faith-based initiatives. 551 U.S. at 595-96, 127 S.Ct. 2553. Relying on *Hein*'s analysis, the district court similarly dismissed the plaintiffs' claims because they "fail[ ] to allege any particular appropriation, and thus obviously also fail[ ] to allege any legislative action." *Pedreira IV,* 553 F.Supp.2d at 861. The plaintiffs sought leave to file a second amended complaint that added references to state and federal funding provisions in support of standing. The district court denied their motion but found that even if it had considered the new complaint, their "additional allegations do not save the claim." *Id.*

On appeal, the plaintiffs refer to the same state and federal provisions to support standing as they presented to the district court in their proffered second amended complaint. Looking at the record that was before the district court, we find that the plaintiffs have not alleged a sufficient nexus to show federal taxpayer standing. Even considering the proposed second amended complaint, as the district court did, the question before us is whether the plaintiffs' invocation of Social Security Act's Title IV-E and Supplemental Security Income programs, codified at 42 U.S.C. §§ 670-679b and 42 U.S.C. §§ 1381-1383f, respectively, as congressional authorization of funds to KBHC satisfies *Flast.* Various statutes governing these programs authorize federal funding for states to provide foster care and maintenance for children. *See* 42 U.S.C. §§ 670-679b. Under a complex

statutory scheme, states are entitled to payments for childcare, including for child placement services such as those provided by KBHC. *See* 42 U.S.C. § 674(a)(3). Drawing on the fact that federal funds from these programs are regularly funneled to service providers in Kentucky, the plaintiffs argue that these programs are specific legislative actions for purposes of satisfying the first prong of the *Flast* test.

Even though the plaintiffs refer to specific federal programs and specific portions of these programs, they have failed to explain how these programs are related to the alleged constitutional violation. These statutes are general funding provisions for childcare; they do not contemplate religious indoctrination. The plaintiffs respond that the statutes do not *forbid* unconstitutional uses of these funds. A failure to prohibit unconstitutionality, however, does not equate to an unconstitutional congressional funding mandate. While the plaintiffs do challenge congressional legislation, as required by *Flast,* 392 U.S. at 102, 88 S.Ct. 1942, the plaintiffs' claims are simply too attenuated to form a sufficient nexus between the legislation and the alleged violations. *Compare with Bowen,* 487 U.S. at 620, 108 S.Ct. 2562 (finding that the plaintiffs had alleged a sufficient nexus between the specific legislative action of the Adolescent Family Life Act and alleged violations of the religious clauses of the First Amendment).

(b.) State Taxpayer Standing

As with federal taxpayer standing, the plaintiffs must demonstrate "a good-faith pocketbook" injury to demonstrate state taxpayer standing. *See Doremus v. Bd. of Educ. of Borough of Hawthorne,* 342 U.S. 429, 434, 72 S.Ct. 394, 96 L.Ed. 475 (1952); *Taub v. Kentucky,* 842 F.2d 912, 918 (6th Cir.1988). The defendants argue that the plaintiffs must also show a nexus. Each requirement will be addressed in turn.

i. Injury

The plaintiffs point to the alleged $100 million received by KBHC from Kentucky as the requisite "pocketbook" injury. *Doremus,* 342 U.S. at 434, 72 S.Ct. 394. The Kentucky legislature established a regulatory structure to authorize the placement of children with private facilities. *See, e.g.,* Ky.Rev.Stat. § 200.115, § 605.090(1)(d). According to the plaintiffs, Kentucky was well aware that it was funding KBHC and that its funds were used to finance religious activity. Defendants former Secretary of the Justice Cabinet and former Secretary of the Cabinet for Families and Children attempted to terminate the contractual relationship between KBHC and Kentucky because they were worried about the state "endorsing – or at least through our funding – giving some sort of state sanction to a religious practice." Pointing to material submitted by KBHC, the plaintiffs show that the Kentucky legislature itself was aware that it was funding KBHC when it issued a

legislative citation thanking KBHC for its work with children. Ky. H.R. Jour., 2006 Reg. Sess. No. 57, Mar. 24, 2006, Legislative Citation No. 142. Furthermore, the Kentucky legislature also appropriated sums of money specifically to KBHC.2005 Ky. Laws Ch. 173 (HB 267) (H)(10)(5), *available at* http://www.lrc.ky.gov/record/05RS/HB267.htm. Unlike in the federal taxpayer analysis, the plaintiffs have alleged a "concrete and particularized" injury. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 344, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). These legislative acts show a direct injury to the plaintiffs, as their tax money is funding KBHC and constitutes "lost revenue." *Johnson v. Econ. Dev. Corp. of County of Oakland,* 241 F.3d 501, 507 (6th Cir.2001).[4]

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[4] The district court initially found that the plaintiffs had established standing by demonstrating that KBHC received federal and state funds and alleging that KBHC was a pervasively sectarian institution. *Pedreira III,* slip op. at 3. The district court reconsidered its decision in light of *Hein* and found that the plaintiffs did not have standing. However, *Hein* did not change the standards for standing. As the Supreme Court announced:

> Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent. The Court of Appeals did not apply *Flast*; it extended *Flast*. It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic. That was the approach that then-Justice Rehnquist took in his opinion for the Court in *Valley*

(Continued on following page)

ii. Nexus

The defendants cite a Seventh Circuit decision to show that at least one court has required a demonstration of nexus for state taxpayer standing. *Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly,* 506 F.3d 584, 598 (7th Cir.2007). In response, the plaintiffs rely on Supreme Court and Sixth Circuit cases to argue that they do not have to satisfy the *Flast* nexus test to establish state taxpayer standing. *See Johnson,* 241 F.3d at 507 (rejecting defendants' argument that state taxpayers must show a nexus to satisfy the standing requirement). They contend that alleging a direct injury is sufficient. *See Doremus,* 342 U.S. at 434, 72 S.Ct. 394.

As previously noted by this court, "[v]ery few cases have dealt with state taxpayer standing as it relates to the Establishment Clause." *Johnson,* 241

> *Forge,* and it is the approach we take here. We do not extend *Flast,* but we also do not overrule it. We leave *Flast* as we found it.

Hein, 551 U.S. at 614-15, 127 S.Ct. 2553. As this court recently stated in rejecting a similar attempt to use *Hein* to limit taxpayer standing, *Hein* "did not erect a new barrier to taxpayer suits; it marked the boundaries of an existing exception to the rule against federal and state taxpayer standing." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.,* 567 F.3d 278, 285-86 (6th Cir.2009). Because *Hein* explicitly refused to alter the standards for taxpayer standing, there is no reason for the district court to have interpreted *Hein* to change the requirements for standing. As the district court initially found, the plaintiffs have demonstrated sufficient injury to plead taxpayer standing.

F.3d at 507. Furthermore, this court has not addressed state taxpayer standing at all since the Supreme Court's decisions in *DaimlerChrysler* or *Hein*. In *DaimlerChrysler*, the Supreme Court confirmed that the logic and reasoning of the standing analysis for federal taxpayers extends to state taxpayers. 547 U.S. at 345, 126 S.Ct. 1854. Nevertheless, the Supreme Court did not apply the *Flast* nexus requirement in *DaimlerChrysler*. *See id.* Instead, the Supreme Court applied the injury requirement, which has always been applicable to both federal and state taxpayers, and found that the plaintiffs did not sufficiently plead an injury: "We then reiterate[d] what we had said in rejecting a federal taxpayer challenge to a federal statute 'as equally true when a state Act is assailed: The [taxpayer] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally." *Id.* (internal quotation marks and citations omitted) (alterations in original).

Noting that no Supreme Court or Sixth Circuit case has applied the nexus test to analyze state taxpayer standing, even while discussing the similarities of the two analyses, we decline to find that *Hein* overrules our precedent that specifically instructs that nexus is *un* necessary in state taxpayer cases. *See Johnson*, 241 F.3d at 507.

Even if there were a nexus requirement, the plaintiffs have sufficiently demonstrated a link between the challenged legislative actions and the

alleged constitutional violations, namely that Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds a religious organization. As discussed above, the plaintiffs have pointed to Kentucky statutory authority, legislative citations acknowledging KBHC's participation, and specific legislative appropriations to KBHC. Through these specifications, the plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution. *See Ams. United for Separation of Church & State v. Sch. Dist. of City of Grand Rapids,* 718 F.2d 1389, 1416 (6th Cir.1983) ("Had plaintiffs challenged the constitutionality of these [state] legislative enactments, they may possibly have invoked taxpayer standing. . . ."). This case thus falls squarely within the line of cases where the Supreme Court and our sister circuits have upheld taxpayer standing when grants, contracts, or other tax-funded aid are provided to private religious organizations pursuant to explicit legislative authorization. *See, e.g., Bowen,* 487 U.S. at 619-20, 108 S.Ct. 2562; *Flast,* 392 U.S. at 103-04, 88 S.Ct. 1942; *Freedom from Religion Found., Inc. v. Bugher,* 249 F.3d 606, 609-10 (7th Cir.2001); *DeStefano v. Emergency Hous. Group, Inc.,* 247 F.3d 397, 403-05 (2d Cir.2001); *Lamont v. Woods,* 948 F.2d 825, 829-31 (2d Cir.1991); *Pulido v. Bennett,* 860 F.2d 296, 297-98 (8th Cir.1988). Finding that the plaintiffs

have sufficiently demonstrated standing as state taxpayers, we reverse the judgment of the district court.[5] To the extent that the second amended complaint and supporting documents clarified the plaintiffs' standing arguments, we reverse the district court's denial of the plaintiffs' motion for leave to amend with respect to the amendments regarding standing only.

2.

The plaintiffs also claim that the district court erred in prohibiting them from presenting evidence related to Pedreira's termination in support of their First Amendment claim. The district court dismissed Pedreira's and Vance's employment discrimination claims and also dismissed the portion of the plaintiffs' First Amendment claims that was grounded on Pedreira's termination. To the extent that the plaintiffs seek to restate Pedreira's employment discrimination claim as a constitutional one, we affirm the judgment of the district court. The termination of

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[5] The American Center for Law and Justice argues in its *amicus* brief that interests of federalism and separation of powers counsel against finding standing. These concerns are taken into consideration by the strict requirement for taxpayer standing. As the *amicus* brief itself notes, "[r]equiring a distinct and palpable injury for state taxpayers comports with notions of federalism that are central to our system of government." *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402 (10th Cir.1992). The plaintiffs have met this high burden and thus established state taxpayer standing.

Pedreira based on her sexual orientation is not a violation of the Establishment Clause because, as noted above, she has not established discrimination based on religion.

However, the fact that Pedreira has not presented an employment discrimination claim based on her termination does not mean that KBHC's hiring practices are not relevant for the First Amendment inquiry. In fact, courts routinely look to employment policies to shed light on the sectarian nature of an institution for purposes of the Establishment Clause. *See, e.g., Roemer v. Bd. of Public Works of Md.*, 426 U.S. 736, 757, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 767-68, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); *Hunt v. McNair*, 413 U.S. 734, 743-44, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Johnson*, 241 F.3d at 504-05; *see also Columbia Union Coll. v. Clarke*, 159 F.3d 151, 163 (4th Cir.1998) (adopting a four-factor test based on Supreme Court precedent for the determination of whether a school is pervasively sectarian for First Amendment purposes that includes "how much do the religious preferences shape the . . . hiring and student admission processes" as a factor). KBHC concedes that its policy of firing and not hiring gays and lesbians is religiously inspired. Although a religiously inspired employee conduct rule is not sufficient to constitute discrimination on the basis of religion, it is relevant to an inquiry under the Establishment Clause. We thus reverse the district court's dismissal of this portion of the plaintiffs' First

Amendment claim to the extent that it prohibits plaintiffs from presenting evidence of KBHC's hiring practices.[6]

III.

For the foregoing reasons, we affirm the dismissal of the plaintiffs' employment discrimination claims and reverse and remand for further proceedings the plaintiffs' First Amendment claims.

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[6] The defendants have not appealed the denial of their motion for summary judgment. Now that the dismissal of the plaintiffs' claims is reversed, the plaintiffs may proceed with their claims on remand.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-5538

ALICIA M. PEDREIRA; KAREN VANCE; PAUL SIMMONS; JOHANNA W.H. VAN WIJK-BOS; and ELWOOD STURTEVANT,
Plaintiffs-Appellants,

v.

KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; ISHMUN F. BURKS, Secretary of the Commonwealth of Kentucky Justice and Public Safety Cabinet; and JANIE MILLER, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services,
Defendants-Appellees.

Before: CLAY and GIBBONS, Circuit Judges; GREER, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

(Filed Aug. 31, 2009)

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's dismissal of the plaintiffs' employment discrimination claims is AFFIRMED. IT IS FURTHER ORDERED that the dismissal of the plaintiffs' First Amendment claims is

REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

United States District Court,
W.D. Kentucky,
at Louisville.
Alecia M. PEDREIRA, et al., Plaintiffs
v.
KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., et al., Defendants.
Civil Action No. 3:00-CV-210-S.

March 31, 2008.

Alex J. Luchenitser, Americans United for Separation of Church and State, Alexander E. Bennett, Alicia A.W. Truman, E. Lea Johnston, Elizabeth Leise, Joshua A. Wilson, Murray R. Garnick, David B. Bergman, Arnold & Porter LLP, Ayesha Khan, Washington, DC, Bruce R. Kelly, Kenneth Y. Choe, Matthew Coles, New York, N.Y., William E. Sharp, ACLU of Kentucky Foundation, Inc., Vicki L. Buba, Oldfather Law Firm, for Plaintiffs.

Gregory S. Baylor, Religious Liberty Advocates of the Christian Legal Society, Springfield, VA, John O. Sheller, Jeffrey Calabrese, Stoll Keenon Ogden PLLC, Jan M. West, Jonathan D. Goldberg, Jennifer K. Luhrs, Goldberg & Simpson, PSC, Louisville, KY, Robert J. Muise, Patrick T. Gillen, Kimberly A.R. Daniels, Ann Arbor, MI, Timothy J. Tracey, Springfield, VA, for Defendants.

MEMORANDUM OPINION

CHARLES R. SIMPSON, III, District Judge.

This matter is before the court for consideration of the following motions:

1. Motion to dismiss for lack of jurisdiction by Mark D. Birdwhistell, Secretary of the Cabinet for Health and Family Services, and Norman A. Arflack, Secretary of the Justice and Public Safety Cabinet (collectively, "the Commonwealth") (DN 275).

2. Motion to dismiss for lack of jurisdiction by Kentucky Baptist Homes for Children, Inc. ("KBHC") (DN 276).

3. Motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a second amended complaint (DN 288).

4. Motion of the plaintiffs, Alecia M. Pedreira, et al., for hearing on pending motions (DN 289).

5. Motion of the defendant, Kentucky Baptist Homes for Children, Inc., to strike the motion for leave to file a second amended complaint (DN 294).

6. Motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a sur-reply in support of their motion for leave to file a second amended complaint (DN 298).

The briefs of the parties articulately detail the issues and arguments for the court. Therefore, the motion of the plaintiffs for oral argument will be denied. The motion for leave to file a sur-reply will be granted. The motion of KBHC to strike the motion for leave to file a second amended complaint will be denied. KBHC urges quite reasonably that the court should strike the motion on the grounds of untimeliness, prejudice, and for various perceived procedural irregularities. However, in order to ensure that this opinion considers and addresses fulsomely the standing arguments, the court will sidestep these issues, with the exception of the futility argument, and consider the proposed amendments herein.[1] For the reasons explained in greater detail later in this opinion, the motion of the plaintiffs for leave to file a second amended complaint will be denied as futile. *Long v. United States,* 2007 WL 2725973 (W.D.Ky.2007), *citing North American Specialty Insurance Co. v. Myers,* 111 F.3d 1273, 1284 (6th Cir.1997). The motions to dismiss the Establishment Clause claim for lack of standing will be granted, and the action will be dismissed with prejudice.

In April of 2003, the court denied the defendants' motion for judgment on the pleadings challenging

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[1] The court agrees with the defendants that the proposed amendments are more than mere "technical amendments" to the claims already stated in the amended complaint. We conclude, however, that even with the proposed amendments, the taxpayer plaintiffs do not have standing herein.

whether the plaintiffs had standing as state and federal taxpayers to bring an Establishment Clause challenge to the receipt of state and federal money by KBHC for the care of youth placed in its care as wards of the state. The motion was grounded primarily in the contention that there was no factual basis for a finding of a "good-faith pocketbook injury" alleged by this purported unconstitutional conduct. The court ordered further briefing, and permitted the plaintiffs to file an amended complaint amplifying the factual allegations undergirding its claims. The court held that the plaintiffs had satisfied the *Doremus [v. Board of Education,* 342 U.S. 429, 434-435, 72 S.Ct. 394, 96 L.Ed. 475 (1952)] test for taxpayer standing on the facts alleged, and permitted the claims to go forward.

The court is now faced with a new round of motions to dismiss which address new contours added to the body of law addressing Establishment Clause claims raised by state and federal taxpayers.

In June of 2007, the United States Supreme Court handed down its opinion in *Hein v. Freedom Religion Foundation, Inc.,* ___ U.S. ___, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007) which reaffirmed its longstanding decision in *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In so doing, the Court found *Flast* to have been incorrectly applied by the United States Court of Appeals for the Seventh Circuit, and "limit[ed] the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn

by the *results* in *Flast* . . . " *Hein,* 127 S.Ct. at 2569 (emphasis in original), *quoting, United States v. Richardson,* 418 U.S. 166, 196, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). The Court noted that the *Hein* case fell outside the narrow exception that *Flast* created to the general rule against taxpayer standing, and reemphasized that "the *Flast* exception has a 'narrow application in our precedent,' *[DaimlerChrysler Corp. v.] Cuno,* 547 U.S. [332, at 348], 126 S.Ct. [1854], at 1865, [164 L.Ed.2d 589 (2006)] that only 'slightly lowered' the bar on taxpayer standing, *Richardson,* 418 U.S., at 173, 94 S.Ct. 2940, 41 L.Ed.2d 678, and that must be applied with 'rigor,'" *Valley Forge* [*Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464,] at 481, 102 S.Ct. 752[, 70 L.Ed.2d 700 (1982)].

Hein, 127 S.Ct. at 2568.

The defendants ask the court to find that a proper and rigorous application of the *Flast* test, as further refined by the *Hein* analysis, yields the conclusion that the taxpayers in this case lack standing to bring their Establishment Clause claim. We conclude that the defendants are correct, and that the proposed amendments offered by the plaintiffs in their tendered Second Amended Complaint would not alter this conclusion. Therefore the claim must be dismissed.

In order to meet the "case or controversy" requirement of Article III, the plaintiffs must demonstrate standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing is a necessary component of the court's subject matter jurisdiction. *Kardules v. City of Columbus,* 95 F.3d 1335, 1346 (6th Cir.1996). Courts have the continuing obligation to examine their own subject matter jurisdiction. *Zurich Insurance Co. v. Logitrans Inc.,* 297 F.3d 528, 531 (6th Cir.2002).

Background

The following facts, taken from our July 23, 2001 opinion, are restated herein for purposes of continuity only. The matters presently before the court have advanced well beyond the initial premises of the original complaint. Thus these facts are pertinent only insofar as they provide context for the reader.

On October 23, 1998, after approximately seven months of employment, Alicia Pedreira ("Pedreira") was terminated from her position as a Family Specialist at Spring Meadows Children's Home, a facility owned and operated by KBHC.

The decision to terminate her was made after a photograph taken of her together with her acknowledged "life partner" was displayed at the Kentucky State Fair, and her lesbian lifestyle became known to KBHC. The termination statement she received stated "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for

Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values."

KBHC then issued a public statement with respect to the termination to the effect that "[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

KBHC has required that all its employees "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution." KBHC also adopted an employment policy which stated that

> [h]omosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternative lifestyle, we will however, act according to Board policy if a situation is brought to our attention.

Complaint, ¶¶ 25, 29, 34, 35.

Pedreira filed this action challenging her termination and the policies adopted by KBHC on the ground that its actions constitute religious discrimination.

A second plaintiff in this action, Karen Vance ("Vance"), a social worker living in California, alleged

that she wished to relocate to Louisville to be closer to her aging parents. She claimed that there were employment positions open at KBHC for which she was qualified, but for which she had not applied because she is a lesbian. She asserted that her application for a position with KBHC would be futile in light of its formal and well-publicized policy prohibiting gays and lesbians from employment. Complaint, ¶¶ 41, 42, 43. Vance claimed that KBHC's hiring policy constitutes religion-based employment discrimination.

Seven individuals, identified in the complaint as Kentucky taxpayers, were also named plaintiffs in the action. They claimed that government funds provided to KBHC were used to finance staff positions which were filled according to religious tenets, and to provide services designed to instill Christian values and teachings in the children. These plaintiffs contended that state money was thus used for religious purposes, in violation of the United States Constitution.

The Commonwealth of Kentucky was sued on the ground that it violated the Establishment Clause of the First Amendment by providing government funds to KBHC. There is no dispute that KBHC has contracted with Kentucky and received government funds for the operation of its facilities. KBHC provides services to youth placed in its care as wards of the state.

For the reasons stated in the July 23, 2001 Memorandum Opinion, the court dismissed the claims of Pedreira and Vance alleging religious discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and the Kentucky Civil Rights Act, KRS 344.010(1), and further dismissed a portion of the plaintiffs' Establishment Clause claim to the extent that such claim was grounded in the premise that KBHC's employment practices constituted religious discrimination. The constitutional challenge to KBHC's employee conduct requirement was rejected by the court. The court further noted that there was little in the way of evidence upon which to further address the Establishment Clause claim at that time. The motion for summary judgment was denied on the issue, with leave to reinstate on a more complete record.

As already noted, the court permitted the plaintiffs to file an amended complaint to fulsomely detail their Establishment Clause claim. Having determined that the plaintiffs had overcome the practical difficulties in articulating a "good-faith pocketbook injury," the court found that the plaintiffs had alleged sufficient facts to establish taxpayer standing under *Doremus, supra.* and *Johnson v. Economic Development of County of Oakland,* 241 F.3d 501, 509 (6th Cir.2001).

The Amended Complaint realleges much from the original complaint which has been dismissed. We need say nothing more in that regard.

The sum total of the allegations concerning the Establishment Clause claim is the contention that KBHC receives government funds through contracts with Kentucky agencies. These agencies are authorized to distribute state funds for care and treatment as deemed by the agency to be necessary for the well-being of any child committed to the care of the state. Such costs may include medical expenses, room and board, clothing, and other necessities. KRS § 200.115(1). *See,* Amend. Compl., ¶ 22. The Establishment Clause claim (Amend.Compl., ¶¶ 61-68) alleges that the Commonwealth of Kentucky's practice of providing government funds (1) to finance KBHC staff positions that are filled in accordance with religious tenets,[2] and (2) to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitute a violation of the Establishment Clause. Amend. Compl., ¶¶ 63, 64. The plaintiffs allege that "[t]he conduct of the Commonwealth of Kentucky described above has deprived and continues to deprive Plaintiffs of their rights, as taxpayers, that are protected by the First and Fourteenth Amendments . . . " Amend. Compl., ¶ 65.[3]

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[2] This factual premise has been rejected by earlier ruling of the court. As such, it may not be relied on as a basis for an Establishment Clause violation.

[3] The plaintiffs sought leave to file a second amended complaint in July of 2006 which was denied. The amendments proposed therein are not pertinent here.

State and Federal Taxpayers

As an initial matter, the plaintiffs urge that the principles enunciated in the Supreme Court decisions of *Flast* and *Hein, supra.*, are inapplicable to claims by state taxpayers. We find that *Cuno, supra.* and *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly,* 506 F.3d 584, 2007 WL 3146453 (7th Cir. Oct.30, 2007) mandate a contrary conclusion.

The Supreme Court stated in *Cuno* that

> The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers. We indicated as much in *Doremus v. Board of Education of Hawthorne,* 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952). In that case, we noted our earlier holdings that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect" to support standing to challenge "their manner of expenditure." *id.*, at 433, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475. We then "reiterate[d]" what we had said in rejecting a federal taxpayer challenge to a federal statute "as equally true when a state Act is assailed: 'The [taxpayer] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.'" *Id.*, at 433-434, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (quoting *Frothingham, supra,* at 488, 43 S.Ct. 597, 67 L.Ed. 1078); see

> *ASARCO Inc. v. Kadish,* 490 U.S. 605, 613-614, 109 S.Ct. 2037, 104 L.Ed.2d 696 (opinion of KENNEDY, J.) ("[W]e have likened state taxpayers to federal taxpayers" for purposes of taxpayer standing (citing *Doremus, supra,* at 434, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475)).

Cuno, 547 U.S. at 345, 126 S.Ct. 1854.

The plaintiffs urge that *Cuno* is limited to taxpayer standing outside of the Establishment Clause context, and that the Sixth Circuit case of *Johnson, supra.,* establishes that *Flast* does not apply to the issue of state taxpayer standing.

The *Hinrichs* case supports the application of *Cuno* to state taxpayer Establishment Clause claims. In that case, the Seventh Circuit Court of Appeals held that the plaintiffs, state taxpayers seeking to challenge the Indiana "Minister of the Day" legislation, did not have standing to maintain their claim under the authority of *Flast* and *Hein. Hinrichs,* 506 F.3d at 599-602. *See also, Doremus,* 72 S.Ct. at 397.

We do not read anything in *Johnson* to suggest that the Sixth Circuit would decline to apply the holding in *Cuno* to state taxpayer Establishment Clause claims. The plaintiffs urge that since the Sixth Circuit did not apply *Flast* in the *Johnson* case, it established a less demanding standard for demonstrating state taxpayer standing. However, the issue before the court was whether the *Flast* nexus

test applies to state taxpayer claims. Indeed, the *Flast* case is never mentioned in *Johnson*. Rather, the question addressed in *Johnson* was whether a loss of revenue constituted the requisite "financial interest" of a plaintiff to establish standing. *Id.* Thus it was the concept of "expenditure" which the court explored in *Johnson,* and stated that "the Supreme Court in *Doremus* did not distinguish between an expenditure and a loss of revenue in determining whether there was a 'good-faith pocketbook injury'" alleged. *Id.* The nexus test in *Flast* was not pertinent to the issue then before the court. Thus we do not find *Johnson* to be conclusive on this issue.

We conclude that *Flast* is the proper yardstick by which we must measure standing of both state and federal taxpayers to bring the Establishment Clause claim in this case.

Application

The Supreme Court began its decision in *Flast* by stating that *Frothingham v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) stood for forty-five years as "an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." The narrow inroad into this barrier to suit for taxpayers alleging that a federal statute violated the Establishment Clause was premised on the Supreme Court's understanding that the "injury" alleged in Establishment Clause challenges to federal spending are the

very extraction and spending of tax money in aid of religion. *See, Cuno,* 126 S.Ct. at 1865, *quoting, Flast,* 88 S.Ct. at 1955-56.

The *Flast* case involved a claim by New York taxpayers that federal funds appropriated under the Elementary and Secondary Education Act were being used to finance instruction in religious schools, and to purchase materials for use in such schools. The court noted that "Appellants' constitutional attack focused on the statutory criteria which state and local authorities must meet to be eligible for federal grants under the Act." *Flast,* 88 S.Ct. at 1945. The Court explained that under the Act, any plan or program seeking funding was required to be "consistent with such basic criteria as the United States Commissioner of Education may establish." Any state participating in the program was subject to approval and supervision by the Commissioner, and the state was required to give assurances that a state plan would provide library resources, textbooks, and other instructional materials on an equitable basis for the use of children and teachers in private elementary and secondary schools in the state. *Id.*

In holding that the *Flast* plaintiffs had standing to bring their Establishment Clause claim, the court framed a two-part test in addressing the standing issue:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that

> status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education,* 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

Flast, 88 S.Ct. at 1954.

The Court in *Flast* contrasted the facts before it with those in *Frothingham* where the taxpayer was found to lack standing. In *Frothingham,* the taxpayer challenged a particular federal spending program, the

Maternity Act of 1921. She had failed, however, to allege that Congress, in enacting the Act, had breached any specific limitation upon its taxing and spending power. *Flast,* 88 S.Ct. at 1955. Rather, she alleged that the enactment "invaded the legislative province reserved to the States by the Tenth Amendment." The Court explained that "[i]n essence, Mrs. Frothingham was attempting to assert the State's interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." *Id.*

The Court found in *Flast* that, in the employment of the two-part nexus test, cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum for the airing of generalized grievances about the conduct of government would be weeded out. *Flast,* 88 S.Ct. at 1956. A taxpayer "will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Flast,* 88 S.Ct. at 1955.

What we find to be of preeminent importance in *Flast,* and which was emphasized by the court in *Hein, Cuno,* and *Hinrichs,* is that under the *Flast* two-part test the expenditures of which a taxpayer complains must be shown to have been made pursuant to legislative action. Absent such allegation, the

purpose for which the *Flast* exception to the *Frothingham* prohibition was recognized would not be served. Taxpayers may not bring "generalized grievances" by simply asserting their status as payors and challenging the constitutionality of the spending of public funds. In the words of the Supreme Court in *Hein,* it is the "link between congressional action and constitutional violation" that supports taxpayer standing. *Hein,* 127 S.Ct. at 2566.

The Court in *Hein* explained that the challenged expenditures in *Flast* were funded by a specific congressional appropriation and were disbursed to private schools, including religiously affiliated schools, pursuant to a direct and unambiguous congressional mandate which directed that funds be made available to private schools, the majority of which were, at that time, religiously affiliated. *Hein,* 127 S.Ct. at 2565. The Court in *Hein* underscored the importance of this "logical link between their taxpayer status and the type of legislative enactment attacked." *id.*

Similarly, the court discussed *Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988) in which standing was found to mount an as-applied challenge to the Adolescent Family Life Act which authorized federal grants to private community service groups including religious organizations. A sufficient nexus was found even though the funds "had flowed through and been administered by an Executive Branch Official," because the claims called into question how the funds authorized by Congress were being disbursed pursuant to the Act's statutory

mandate. The Court noted that *Kendrick* "involved a 'program of disbursement of funds pursuant to Congress' taxing and spending powers' that 'Congress had created,' 'authorized,' and 'mandated.'" *Hein,* 127 S.Ct. at 2567, *quoting, Kendrick,* 108 S.Ct. at 2580.

By contrast, the *Hein* taxpayers challenged expenditures made under the auspices of the President's Office of Faith-Based and Community Initiatives program created by executive order. Congress did not appropriate money for activities promoted by the program. Rather activities were funded from general Executive Branch appropriations through various agencies such as the Department of Education and the Department of Housing and Urban Development which had Executive Department Centers formed within the agencies pursuant to the President's order. In finding that *Flast* had been improperly applied by the lower court, the Supreme Court held that the *Hein* taxpayers lacked standing because the expenditures at issue were not made pursuant to any Act of Congress. The Court held that the general appropriations to the Executive Branch "did not expressly authorize, direct, or even mention the expenditures of which [the taxpayers] complain," and thus no link between congressional action and constitutional violation had been shown. *Hein,* 127 S.Ct. at 2566.

We find that the claim of the taxpayers in this case is comparable to that in *Hein* rather than *Bowen* or *Flast.* At best, the Amended Complaint alleges that KBHC receives funds through contracts with various

Kentucky agencies. Thus it is alleged that the funds are provided through executive branch allocation rather than through legislative action. The Amended Complaint does allege that Kentucky Agencies charged with the care of children are authorized to make necessary expenditures for their care. However, the Amended Complaint fails to allege any particular appropriation, and thus obviously also fails to allege any legislative action through such appropriation which exceeded the taxing and spending powers of the legislature. Thus no nexus has been shown between any legislation, state or federal, and the alleged constitutional violation. The sole focus of the Amended Complaint is the contracts between KBHC and the Kentucky agencies.[4]

The plaintiffs seek leave to amend the complaint again to add references to state and federal funding provisions which are the purported sources of the funds which make their way into the coffers of the state agencies and ultimately into the hands of KBHC. These additional allegations do not save the claim, however. They are funding provisions which

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[4] Further, we note that the defendants state that these contracts do not, as might be presumed, award money with specific restrictions or conditions on use of the funds. Rather, the contracts entitle KBHC to seek reimbursement of funds expended where the costs have not otherwise been covered and where the expenditures are shown to have been made for permissible childcare expenses. The purported operation of these contracts while interesting, is not dispositive of the issue before us.

authorize spending for the care of children committed to the state's care. They cite provisions of the Social Security Act's Title IVE program as well as Kentucky statutory provisions which authorize the Kentucky agencies to pay for the necessary care and treatment of wards of the state. These general funding provisions are alleged to be the ultimate source of funds, but there are no allegations that these congressional actions bear any connection to the alleged constitutional violation. Indeed, they are wholly non-directive, general funding provisions.

The plaintiffs take a stab at articulating a nexus between the appropriations and the constitutionally challenged conduct by stating that the cited legislation does not contain any safeguards to prevent unconstitutional uses of funds. The plaintiffs have cited no caselaw to support the proposition that a failure to include oversight provisions is the equivalent of a congressional mandate in the context of a constitutional challenge to congressional action.

As noted in *Hein*, "Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action . . . to Establishment Clause challenge by any taxpayer in federal court . . . Such a broad reading would ignore the first prong of *Flast's* standing test which requires a 'logical link between [taxpayer] status and the type of legislative enactment attacked.'" *Hein*, 127 S.Ct. at 2569. We conclude that the Amended Complaint, even

embellished with the proposed recitation of funding sources, fails to demonstrate taxpayer standing to bring the Establishment Clause challenge herein.

For the reasons stated herein the motions of the defendants to dismiss the Establishment Clause claim for lack of standing will be granted and the action will be dismissed with prejudice. A separate order will be entered this date in accordance with this opinion.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALECIA M. PEDREIRA, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:00-CV-210-S

KENTUCKY BAPTIST HOMES
FOR CHILDREN, INC., et al. DEFENDANTS

ORDER

(Filed Mar. 31, 2008)

Motions having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The motion of the defendants, Mark D. Birdwhistell, Secretary of the Cabinet for Health and Family Services, and Norman A. Arflack, Secretary of the Justice and Public Safety Cabinet, to dismiss (DN 275) is **GRANTED.**

2. The motion of the defendant, Kentucky Baptist Homes for Children, Inc., to dismiss (DN276) is **GRANTED.**

3. The motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a second amended co[illegible]plaint (DN 288) is **DENIED.**

4. The motion of the plaintiffs, Alecia M. Pedreira, et al., for hearing (DN 289) is **DENIED.**

5. The motion of the defendant, Kentucky Baptist Homes for Children, Inc., to strike the motion for leave to file a second amended complaint (DN 294) is **DENIED.**

6. The motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a sur-reply (DN 298) is **GRANTED.**

7. The claim of the plaintiffs, Alecia M. Pedreira, et al., alleging a violation of the Establishment Clause of the United States Constitution is **DISMISSED FOR LACK OF TAXPAYER STANDING.**

8. All claims now having been dismissed, the action is **DISMISSED WITH PREJUDICE.** There being no just reason for delay in its entry, this is a final order.

IT IS SO ORDERED.

[SEAL]

March 28, 2008 /s/ Charles R. Simpson III

Charles R. Simpson III, Judge
United States District Court

No. 08-5538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALICIA M. PEDREIRA, ET AL.,	)	
Plaintiff-Appellants,	)	
v.	)	ORDER
KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., ET AL.,	)	(Filed Dec. 16, 2009)
Defendants-Appellees.	)	

BEFORE: CLAY and GIBBONS, Circuit Judges: and GREER,* District Judge.

The court having received two petitions for rehearing en banc, which were circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original

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* Hon, J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

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42 U.S.C. § 672. Foster care maintenance payments program

(b) Additional qualifications

Foster care maintenance payments may be made under this part only on behalf of a child described in subsection (a) of this section who is –

(1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or private child-placement or child-care agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 675(4) of this title).

K.R.S. § 199.640 Licensing of child-caring and child-placing agencies or facilities – License fees – Standards – Recordkeeping and reporting – Use of corporal punishment – Prohibition against hiring convicted sex offender – Confidentiality of records.

(1) Any facility or agency seeking to conduct, operate, or maintain any child-caring facility or child-placing agency shall first obtain a license to conduct, operate, or maintain the facility or agency from the cabinet.

(2) The cabinet shall:

(a) Develop standards, as provided in subsection (5) of this section, which must be met by any facility or agency seeking to be licensed to conduct, operate, or maintain a child-caring facility or child-placing agency;

(b) Issue licenses to any facility or agency found to meet established standards and revoke or suspend a license after a hearing in any case that a facility or agency holding a license is determined to have substantially failed to conform to the requirements of the standards;

(c) Establish and follow procedures designed to insure that any facility or agency licensed to conduct, operate, or maintain a child-caring facility or child-placing agency complies with the requirements of the standards on an ongoing basis.

(3) Licenses shall be issued for a period of one (1) year from date of issue unless revoked by the cabinet. Each licensed facility or agency shall be visited and inspected at least one (1) time each year by a person authorized by the cabinet and meeting specific qualifications established by the secretary of the cabinet in an administrative regulation. A complete report of the visit and inspection shall be filed with the cabinet.

(4) Each license issued shall specify the type of care or service the licensee is authorized to perform. Each initial application for a license shall be accompanied by a fee of one hundred dollars ($100) and shall, except for provisional licenses, be renewable annually upon expiration and re-application when accompanied by a fee of fifty dollars ($50). The fees collected by the secretary shall be deposited in the State Treasury and credited to a revolving fund account for the purpose of carrying out the provisions of this section. The balance of said account shall lapse to the general fund at the end of each biennium.

(5) (a) The secretary shall promulgate administrative regulations establishing basic standards of care and service for child-caring facilities and child-placing agencies relating to the health and safety of all children in the care of the facility or agency, the basic components for a quality program, as referenced below, and any other factors as may be necessary to promote the welfare of children cared for or placed by the agencies and facilities. Standards established may *vary* depending on the capacity of the agency or

facility seeking licensure. These administrative regulations shall establish standards that insure that:

1. The treatment program offered by the facility or agency is directed toward child safety, improved child functioning, improved family functioning, and continuity and permanence for the child;

2. The facility or agency has on staff, or has contracted with, individuals who are qualified to meet the treatment needs of the children being served, including their psychological and psychiatric needs;

3. The facility or agency has procedures in place to insure that its staff receives ongoing training and that all staff members who are required to do so meet all regional and national standards;

4. The facility or agency develops an integrated, outcomes-based treatment plan that meets the health, mental health, education, safety, and security needs of each child in its care;

5. The facility or agency has procedures in place to include parents, family, and other caregivers in a child's treatment program;

6. The facility or agency has procedures in place whereby it evaluates its programs on a quarterly basis and documents changes in the program if the results of the review indicate a change is needed;

7. The facility or agency makes available quality programs for substance abuse prevention and treatment with providers licensed under KRS Chapter 222 as part of its treatment services;

8. The facility or agency initiates discharge planning at admission and provides sufficient aftercare; and

9. The facility or agency has procedures in place that outline the structure and objectives of cooperative relationships with the community within which it is located and the local school district.

(b) The secretary shall promulgate regulations establishing recordkeeping and reporting requirements and standards for licensed agencies and facilities that recognize the electronic storage and retrieval of information for those facilities that possess the necessary technology and that include, at a minimum, the following information relating to children in the care of the agency or facility:

1. The name, age, social security number, county of origin, and all former residences of the child;

2. The names, residences, and occupations, if available, of the child's parents;

3. The date on which the child was received by the agency or facility; the date on which the child was placed in a foster home or made available for adoption;

and the name, occupation, and residence of any person with whom a child is placed; and

4. A brief and continuing written narrative history of each child covering the period during which the child is in the care of the agency or facility.

(c) The secretary may promulgate administrative regulations creating separate licensure standards for different types of facilities.

(d) The secretary shall promulgate administrative regulations to establish practices and procedures for the inspection of child-caring facilities and child-placing agencies. These administrative regulations shall establish a uniform reporting mechanism that includes guidelines for enforcement.

(6) Any administrative regulations promulgated pursuant to KRS Chapter 13A to govern services provided by church-related privately operated child-caring agencies or facilities shall not prohibit the use of reasonable corporal physical discipline which complies with the provisions of KRS 503.110(1), including the use of spanking or paddling, as a means of punishment, discipline, or behavior modification and shall prohibit the employment of persons convicted of any sexual offense with any child-caring facility or child-placing agency.

(7) All records regarding children or facts learned about children and their parents and relatives by any licensed agency or facility shall be deemed

confidential in the same manner and subject to the same provisions as similar records of the cabinet. The information thus obtained shall not be published or be open for public inspection except to authorized employees of the cabinet or of such licensed agency or facility in performance of their duties.

K.R.S. § 199.641 Definitions – Payments to non-profit child-caring facility.

(1) As used in this section, unless the context otherwise requires:

(a) "Allowable costs report" means a report from each child-caring facility that contracts with the department for services and includes all allowable costs as defined by the Federal Office of Management and Budget circular A-122, "cost principles for nonprofit organizations," and other information the department may require, utilizing cost data from each child-caring facility's most recent yearly audited financial statement;

(b) "Child-caring facility" means any institution or group home other than a state facility, or one certified by an appropriate agency as operated primarily for educational or medical purposes providing residential care on a twenty-four (24) hour basis to children, not related by blood, adoption, or marriage to the person maintaining the facility;

(c) "Department" means the Department for Community Based Services of the Cabinet for Health and Family Services;

(d) "Model program cost analysis" means a report based on a time study, the allowable costs report, and other information required by the department from each child-caring facility that contracts with the department for services that determines a statewide median cost for each licensed program category of service provided by child-caring facilities; and

(e) "Time study" means the process of reporting the work performed by employees of child-caring facilities in specified time periods.

(2) Subject to the limitations set forth in subsection (4) of this section, when the department chooses to contract with a nonprofit child-caring facility for services to a child committed to the department, the department shall make payments to that facility based on the rate setting methodology developed from the model program cost analysis. The department shall also assure that the methodology:

(a) Provides payment incentives for moving children as quickly as possible to a permanent, continuous, stable environment;

(b) Provides children who require out-of-home care or alternative treatment with placements that are as close as possible to their home geographic area; and

(c) Provides appropriate placement and treatment services that effectively and efficiently meet the needs of the child and the child's family as close as possible to the child's home geographic area.

(3) The department shall use the model program cost analysis as a basis for cost estimates for the development of the department's biennial budget request.

(4) The secretary shall, to the extent funds are appropriated, establish and implement the rate setting methodology and rate of payment by promulgation of administrative regulations in accordance with KRS Chapter 13A that are consistent with the level and quality of service provided by child-caring facilities. The administrative regulations shall also include the forms and formats for the model program cost analysis.

K.R.S. § 199.650 Authorized activities of child-caring facilities or child-placing agencies.

Any licensed child-caring facility or child-placing agency may contract to provide care, maintenance, and services for a child in accordance with the terms of its license. Any licensed child-caring facility or child-placing agency may receive children committed to its custody and provide care and services for the child until the child is discharged from custody pursuant to law.

K.R.S. § 200.115 Cabinet or Department of Juvenile Justice authorized to pay for care and treatment of child committed to it – Payment by person having charge of child.

(1) The cabinet or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other necessities for such children committed to its care and custody, but only if no similar services are rendered by other agencies.

(2) Where the person having charge of the child is able to pay for the care or treatment or portions thereof, the court shall so direct and in what amounts, and such funds as he is able to pay shall be turned over to the cabinet or the Department of Juvenile Justice, as appropriate, or the person having custody and care of the child to be applied on the cost of the treatment and care of the child.

K.R.S. § 605.090 Alternative treatment for committed children – Notice of inappropriate behavior of child – Procedures for removal of child committed as dependent, neglected, or abused – Reports – Written transfer summary – Placement of public offenders.

(1) Unless precluded by law, any child committed to the Department of Juvenile Justice or the cabinet may by the decision of the Department of Juvenile Justice or the cabinet or its designee, at any time during the period of his or her commitment, be:

(a) Upon fourteen (14) days' prior written notice to the court, discharged from commitment. Written notice of discharge shall be given to the committing court and to any other parties as may be required by law;

(b) Placed in the home of the child's parents, in the home of a relative, a suitable foster home, or boarding home, upon such conditions as the Department of Juvenile Justice or the cabinet may prescribe and subject to visitation and supervision by a social service worker or juvenile probation and parole officer.

1. At the time a committed child is placed in the home of his or her parents by the Department of Juvenile Justice or the cabinet, the parents shall be informed in writing of the conditions of the placement and the criteria that will be used to determine whether removal is necessary.

2. At the time a committed child is placed anywhere other than the home of the child's parents, the cabinet or the Department of Juvenile Justice shall inform the foster home, the relative, or the governing authority of any private facility or agency in which the child has been placed whether the minor placed is a juvenile sexual offender as defined in KRS 635.505(2) or of any inappropriate sexual acts or sexual behavior by the child specifically known to the cabinet or Department of Juvenile Justice, and any behaviors of the child specifically known to the cabinet or Department of Juvenile Justice that indicate a safety risk for the placement. Information received by any private facility or agency under this paragraph shall be disclosed immediately and directly to the individual or individuals who have physical custody of the child.

3. If, after a placement is made, additional information is obtained by the cabinet or the Department of Juvenile Justice about inappropriate sexual behavior or other behavior of the committed child that may indicate a safety risk for the placement, the cabinet or the Department of Juvenile Justice shall as soon as practicable, but no later than seventy-two (72) hours after the additional information is received, inform the foster parent, relative, or private facility or agency. Additional information received

by any private facility or agency shall be disclosed immediately and directly to the individual or individuals who have physical custody of the child.

4. Information disclosed under this paragraph shall be limited to the acts or behaviors of the committed child and shall not constitute a violation of confidentiality under KRS Chapter 610 or 620. No foster parent, relative, or other person caring for a committed child shall divulge the information received under this paragraph to persons who do not have a legitimate interest or responsibility relating to the case. Nothing in this subparagraph shall prohibit the disclosure or sharing of information between a foster parent, custodian, private facility, or governmental entity for the protection of any child. A violation of this subparagraph is a Class B misdemeanor;

(c) Placed in one (1) of the facilities or programs operated by the Department of Juvenile Justice or the cabinet, except that no child committed under the provisions of KRS 610.010(2)(a), (b), or (c) shall be placed in a facility operated by the Department of Juvenile Justice for children adjudicated as a public offender unless the cabinet and the department agree, and the court consents, that the placement is in the best interest of the child and that the placement does not exceed a group home level;

(d) Placed in a child-caring facility operated by a local governmental unit or by a private organization willing to receive the child, upon such conditions as the cabinet may prescribe;

(e) However, under no circumstances shall a child committed under KRS Chapter 620 be placed in a home, facility, or other shelter with a child who has been committed to the Department of Juvenile Justice for commission of a sex crime, as that term is defined in KRS 17.500, unless the child committed for the commission of a sex crime is kept segregated from other children in the home, facility, or other shelter that have not been committed for the commission of a sex crime;

(f) Treated as provided in KRS Chapter 645;

(g) Following the transfer or placement of a child pursuant to paragraphs (b), (c), (d), (e), or (f) of this subsection, the Department of Juvenile Justice or the cabinet shall, within fourteen (14) days, excluding weekends and holidays, give written notice to the court of the transfer, the placement, and the reasons therefor.

(2) No child ten (10) years of age or under shall be placed in a facility operated by the Department of Juvenile Justice for children adjudicated as public offenders, except that a child charged with the commission of a capital offense or with an offense designated as a Class A or Class B felony may be detained in a state-operated detention facility when there is no available less restrictive alternative.

(3) If a child committed to the cabinet as dependent, neglected, or abused is placed in the home of the child's parents, the child shall not be removed except in accordance with the following standards and procedures:

(a) If the social service worker believes that the committed child continues to be dependent, neglected, or abused, but immediate removal is unnecessary to protect the child from imminent death or serious physical injury, the casework situation and evidence shall be reviewed with his supervisor to determine whether to continue work with the family intact or to remove the child. There shall be documentation that the social service worker, prior to the court hearing, made an effort to contact the parents to inform them of the specific problems that could lead to removal so they have an opportunity to take corrective action. If the parents are unavailable or do not respond to attempts to communicate, the specific circumstances shall be documented;

(b) If it appears that the child's health or welfare or physical, mental, or emotional condition is subjected to or threatened with real and substantial harm and there is not reasonably available an alternative less drastic than removal of the child from the home, the cabinet shall petition the District Court to review the commitment pursuant to KRS 610.120 in relation to the cabinet's intention to remove the child from the parent's home. The petition shall set forth the facts which

constitute the need for removal of the child. The court shall serve notice of the petition and the time and place of the hearing on the parents; however, the social service worker shall also contact the parents to ensure that they received the notice and are aware of the right to be represented by counsel. If the parents' whereabouts are unknown, notice may be mailed to the last known address of an adult who is a near relative. If the court fails to find that the child's health or welfare or physical, mental, or emotional condition is subjected to or threatened with real and substantial harm, or recommends a less drastic alternative that is reasonably available, the child shall not be removed from the parents' home;

(c) If a social service worker finds a committed, unattended child who is too young to take care of himself, the social service worker shall make reasonable efforts to arrange for an emergency caretaker in the child's home until the parents return or fail to return within a reasonable time. If no in-home caretaker is available for the child, the social service worker shall request any appropriate law enforcement officer to take the child into protective custody. If, after a reasonable time, it appears the child has been abandoned, the cabinet shall petition the District Court to review the case; or

(d) If there exist reasonable grounds to believe that the child is in danger of imminent death or serious physical injury or is being sexually

abused and that the parents are unable or unwilling to protect the child, the social service worker shall, with the assistance of a law enforcement officer, immediately remove the child prior to filing a petition for review. Within seventy-two (72) hours after the removal, the cabinet shall file a petition for review in District Court pursuant to KRS 610.120 with a request for an expeditious hearing. If the court fails to find that the child's health or welfare or physical, mental, or emotional condition is subjected to or threatened with real and substantial harm, or recommends a less drastic alternative that is reasonably available, the child shall be returned to the parents' home.

(4) The cabinet or the Department of Juvenile Justice, as appropriate, shall notify the juvenile court of the county of placement with the conditions of supervised placement of each child placed in that county from one (1) of the residential treatment facilities operated by the Department of Juvenile Justice or the cabinet. Notice of the conditions of such placement may be made available by the court to any law enforcement agency.

(5) The person in charge of any home to which a child is probated, and the governing authority of any private facility or agency to which a child is committed, shall make such reports to the court as the court may require, and such reports as the Department of Juvenile Justice or the cabinet may require in the performance of its functions under the law. The Department of Juvenile

Justice or the cabinet shall have the power to make such visitations and inspections of the homes, facilities, and agencies in which children who have committed public offenses have been placed as it deems necessary to carry out its functions under the law.

(6) The Department of Juvenile Justice or the cabinet shall provide a written transfer summary to the person in charge of any foster home or any governing authority of any private facility or agency in which the Department of Juvenile Justice or the cabinet has placed a child. The written summary shall include, at a minimum, demographic information about the child, a narrative statement detailing the child's prior placements, the length of time the child has been committed, a description of the services and assistance provided to the child or the child's family since the most current case plan, a copy of the current case plan for the child and the child's family, and a copy of the child's medical and educational passport, if available, provided that no information shall be provided that violates any statutory confidentiality requirements. The transfer summary shall state whether the child placed is a juvenile sexual offender as defined in KRS 635.505(2), and include information required under subsection (1) of this section. The transfer summary shall be provided by the Department of Juvenile Justice if it is responsible for the child, or the cabinet if it is responsible for the child, within seven (7) days of the placement of the child with the person, agency, or facility providing care to the child.

(7) The Department of Juvenile Justice may assist the courts in placing children who have committed public offenses in boarding homes, and, under agreements with the individual courts, may assume responsibility for making such placements. Counties may pay or contribute towards the expenses of maintaining such children and, to the extent authorized by the fiscal court, the Department of Juvenile Justice may incur obligations chargeable to the county for such expenses.

K.R.S. § 605.120 Payments to home where children are placed – Reimbursement system for foster parents – Pilot projects – Kinship care program – Administrative regulations – Decisions regarding haircuts and hairstyles.

(1) The cabinet is authorized to expend available funds to provide for the board, lodging, and care of children who would otherwise be placed in foster care or who are placed by the cabinet in a foster home or boarding home, or may arrange for payments or contributions by any local governmental unit, or public or private agency or organization, willing to make payments or contributions for such purpose. The cabinet may accept any gift, devise, or bequest made to it for its purposes.

(2) The cabinet shall establish a reimbursement system, within existing appropriation amounts, for foster parents that comes as close as possible to meeting the actual cost of caring for foster children. The cabinet shall consider providing

additional reimbursement for foster parents who obtain additional training, and foster parents who have served for an extended period of time. In establishing a reimbursement system, the cabinet shall, to the extent possible within existing appropriation amounts, address the additional cost associated with providing care to children with exceptional needs.

(3) The cabinet shall review reimbursement rates paid to foster parents on a biennial basis and shall issue a report in October of each odd-numbered year to the Legislative Research Commission comparing the rates paid by Kentucky to the figures presented in the Expenditures on Children by Families Annual Report prepared by the United States Department of Agriculture and the rates paid to foster parents by other states. To the extent that funding is available, reimbursement rates paid to foster parents shall be increased on an annual basis to reflect cost of living increases.

(4) The cabinet is encouraged to develop pilot projects both within the state system and in collaboration with private child caring agencies to test alternative delivery systems and nontraditional funding mechanisms.

(5) To the extent funds are available, the cabinet may establish a program for kinship care that provides a more permanent placement with a qualified relative for a child that would otherwise be placed in foster care due to abuse, neglect, or death of both parents.

(6) The cabinet shall promulgate administrative regulations in accordance with KRS Chapter 13A to implement the provision of subsection (5) of this section. The administrative regulations shall include uniform conditions and requirements regarding:

(a) Eligibility requirements for the kinship caregiver and the child;

(b) Financial assistance and payment rates; and

(c) Support services and case management services that may be provided to the kinship caregiver or the child.

(7) Foster parents shall have the authority to make decisions regarding haircuts and hairstyles for foster children who are in their care for thirty (30) days or more.

KENTUCKY 2005 SESSION LAWS
2005 REGULAR SESSION

CHAPTER 173
HB 267
APPROPRIATIONS – STATE BUDGET

AN ACT relating to appropriations and revenue measures providing financing for the operations, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state-supported activities.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

H. HEALTH AND FAMILY SERVICES CABINET.

Budget Units

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10. COMMUNITY BASED SERVICES

	2004-05	2005-06
General Fund (Tobacco)	**8,300,400**	**8,300,400**
General Fund	**275,476,700**	**300,236,700**
Restricted Funds	**135,169,500**	**118,779,800**
Federal Funds	**475,266,700**	**485,621,100**
TOTAL	**895,213,300**	**912,938,000**

(1) **Tobacco Settlement Funds:** Included in the above General Fund (Tobacco) appropriation is $8,120,400 in each fiscal year for the Early Childhood Development Program, and $180,000 in each fiscal year for Child Advocacy Centers.

(2) **Out-of-Home Care:** Included in the above General Fund appropriation is $20,309,700 in fiscal year 2005-2006 which is necessary to support and sustain the increased number of court-committed children in the care of the Cabinet.

(3) **Criminal Background Investigation Fee Establishment:** The Secretary shall be authorized to promulgate administrative regulations necessary to prescribe criminal background investigation fee amounts which are reflected in the Restricted Funds appropriation above.

(4) **Personal Care Home State Supplementation Payment Increase:** Included in the above appropriation is $2,910,000 in General Fund support and $450,000 in Restricted Funds in fiscal year 2005-2006 to increase State Supplementation

payments to Personal Care Homes by $20 per month per eligible resident for the personal needs allowance and $2 per day per eligible resident for a facility payment increase.

(5) Kentucky Baptist Children's Home Youth Ranch: Included in the above appropriation is $200,000 in General Fund support in fiscal year 2005-2006 for Alternatives for Children educational classrooms at the Kentucky Baptist Children's Home Youth Ranch.

(6) Bluegrass Domestic Violence Program: Included in the above appropriation is $100,000 in General Fund support in fiscal year 2005-2006 to purchase vans and security equipment and for operating costs.

TOTAL – HEALTH AND FAMILY SERVICES CABINET

	2004-05	2005-06
General Fund (Tobacco)	**26,423,400**	**27,028,400**
General Fund	**1,450,700,300**	**1,551,139,300**
Restricted Funds	**873,592,500**	**781,864,200**
Federal Funds	**3,867,637,800**	**3,753,002,800**
TOTAL	**6,218,354,000**	**6,113,034,700**

KENTUCKY 2008 SESSION LAWS
2008 REGULAR SESSION

CHAPTER 127
HB 406
APPROPRIATIONS –
EXECUTIVE BRANCH BUDGET

AN ACT relating to appropriations and revenue measures providing financing and conditions for the operations, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state-supported activities.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

PART I

H. HEALTH AND FAMILY SERVICES CABINET

Budget Units

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10. COMMUNITY BASED SERVICES

	2008-09	2009-10
General Fund (Tobacco)	**8,970,400**	**9,220,400**
General Fund	**346,147,200**	**350,145,700**
Restricted Funds	**141,311,600**	**143,498,700**
Federal Funds	**533,312,100**	**536,884,300**
TOTAL	**1,029,741,300**	**1,039,749,100**

(1) **Tobacco Settlement Funds:** Included in the above General Fund (Tobacco) appropriation is $8,970,400 in fiscal year 2008-2009 and $9,220,400 in fiscal year 2009-2010 for the Early Childhood Development Program.

(2) **Debt Service:** Included in the above General Fund appropriation is $91,000 in fiscal year 2009-2010 for new debt service to support new bonds as set forth in Part II, Capital Projects Budget, of this Act.

(3) **Private Child Care Provider Reimbursement Rates:** Included in the above appropriation is $3,800,000 in General Fund moneys, $2,684,100 in Restricted Funds, and $836,100 in Federal Funds in each fiscal year to continue private child care provider fiscal year 2007-2008 reimbursement rates.

JOURNAL
of the
HOUSE OF REPRESENTATIVES
of the
General Assembly
of the
Commonwealth of Kentucky

2006 Regular Session

Volume III

* * *

Representative Napier moved the adoption of the following **Legislative Citation No. 142**.

The House of Representatives of the Commonwealth of Kentucky hereby recognizes and honors the administration and staff members of the Kentucky Baptist Homes For Children for their extraordinary efforts in assisting those children within the Commonwealth in need and providing for them a safe and nurturing environment. Founded in 1869 to offer aid to children who were orphaned after the Civil War, this esteemed and exceptional charitable organization currently provides foster care and residential group homes for thousands of children across Kentucky who have been victims of neglect or physical, sexual or emotional abuse and consistently strives, as part of its mission, to serve those that are hurting and in need of hope and healing to break the cycle of abuse. Inasmuch as the Kentucky Baptist Homes for Children has demonstrated remarkable dedication to providing for those children within the communities

of this great Commonwealth a home filled with compassion and encouragement, the members of this august body are pleased to join with Representative Lonnie Napier as he recognizes all those who have contributed to this extraordinary and benevolent institution and in extending best wishes for their continued prosperity and success. Done in Frankfort, Kentucky, this twenty-fourth day of March, in the year two thousand and six.

Legislative Citation No. 142 was adopted without objection.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, BOB CUNNINGHAM, JANE DOE AND JAMES DOE Plaintiffs v. KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., VIOLA MILLER, SECRETARY, CABINET FOR FAMILIES AND CHILDREN, AND ROBERT STEPHENS, SECRETARY, JUSTICE CABINET Defendants	CIVIL ACTION NO. 3:00-CV-210-S **AMENDED COMPLAINT**

INTRODUCTION

This lawsuit is brought on behalf of seven Kentucky taxpayers and one additional Plaintiff who object to and have been injured by the Commonwealth of Kentucky's funding of the Kentucky Baptist Homes for Children, Inc. (hereinafter "KBHC"). The KBHC uses Commonwealth funds to hire employees who are required to accept and abide by the institution's

religious beliefs, and to pay for services that seek to teach youth the institution's version of Christian values.

Alicia Pedreira was employed by KBHC and then terminated because her committed relationship with another woman is inconsistent with KBHC's religious beliefs. Karen Vance is barred from employment by KBHC for the same reason. Jane and James Doe are the tax-paying parents of a young man who was a resident of KBHC and was seriously damaged by KBHC's policies. Several other taxpayer Plaintiffs are clergy and concerned citizens who object to the use of their tax dollars to fund the religion-based discrimination of KBHC.

Plaintiffs believe that the actions of the Commonwealth of Kentucky and the Kentucky Baptist Homes for Children violate the Establishment Clause of the First Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, and the Kentucky Civil Rights Act.

JURISDICTION

1. This action involves a federal question under the First Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331(a), which gives federal district courts original jurisdiction over cases involving federal questions; 28 U.S.C. § 1343; and 42 U.S.C. §§ 2000e *et seq.* Pursuant to 28 U.S.C. § 1367, Plaintiffs request that this Court invoke its supplemental jurisdiction to

hear claims arising under state law because those claims are so related to Plaintiff's federal claims as to form part of the same case or controversy under Article III of the United States Constitution. This Court has jurisdiction to grant the declaratory relief requested under 28 U.S.C. § 2201.

VENUE

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because some of the Defendants reside in this district, and a substantial number of the events giving rise to these claims occurred in this district.

PARTIES

3. Plaintiff ALICIA M. PEDREIRA (hereinafter "Pedreira") is a resident of Louisville, Kentucky. At all relevant times, PEDREIRA was employed as a Family Specialist at Spring Meadows Children's Home of the KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC"). At all relevant times Pedreira has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

4. Plaintiff KAREN VANCE ("Vance") is a resident of Long Beach, California.

5. Plaintiff PAUL SIMMONS ("Simmons") is a resident of Louisville, Kentucky. At all relevant times, SIMMONS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

6. Plaintiff JOHANNA W.H. VAN WIJK-BOS ("Bos") is a resident of Louisville, Kentucky. At all relevant times, BOS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

7. Plaintiff ELWOOD STURTEVANT ("Sturtevant") is a resident of Louisville, Kentucky. At all relevant times, STURTEVANT has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

8. Plaintiff BOB CUNNINGHAM ("Cunningham") is a resident of Louisville, Kentucky. At all relevant times, CUNNINGHAM has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

9. Plaintiffs JANE and JAMES DOE ("the Does") are residents of Hardin County, Elizabethtown, Kentucky. At all relevant times, the DOES have been, and continue to be, taxpayers of the Commonwealth of Kentucky. They are the parents of John Doe, a minor who was under the care of KBHC while ALICIA PEDREIRA was employed there. The true names of the DOES and John Doe are not included in this Complaint in order to protect their confidentiality.

10. Defendant KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC") is a non-profit corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business located in Louisville, Kentucky.

11. Defendant VIOLA MILLER ("Miller") is the Secretary of the Cabinet for Families and Children of the Commonwealth of Kentucky. In this capacity, MILLER is responsible for approving all contracts for services between the Cabinet for Families and Children and contracting agencies, including KBHC. MILLER's actions complained of were performed and undertaken under color of Kentucky law. She is sued in her official capacity only.

12. Defendant ROBERT STEPHENS is the Secretary of the Justice Cabinet of the Commonwealth of Kentucky. In this capacity, STEPHENS is responsible for approving all contracts for services between the Justice Cabinet and contracting agencies, including KBHC. STEPHENS' actions complained of were performed and undertaken under color of Kentucky law. He is sued in his official capacity only.

13. Plaintiffs are all federal taxpayers. They have federal as well as state taxpayer standing because KBHC is the recipient of federal as well as state taxpayer dollars.

STATEMENT OF FACTS

14. ALICIA PEDREIRA holds a Bachelor of Science degree and a Master of Arts degree from the University of Louisville. She is currently employed as an intake counselor supervisor by Seven Counties Services, a Kentucky corporation that assists individuals in need of mental health services. PEDREIRA

is a lesbian and is in a long-term committed relationship with her life partner, Nance Goodman.

15. In or about February 1998, PEDREIRA was recruited by Jack Cox, KBHC Program Director, to apply for the publicly-funded position of Family Specialist at KBHC. PEDREIRA told Cox that she was a lesbian, and he still encouraged her to apply for the position. She applied, was offered and accepted the position, and began working full-time at the Spring Meadows Children's Home of KBHC on March 19, 1998.

16. PEDREIRA's job responsibilities included supervising adolescent youth in a transitional living cottage, teaching independent living skills, counseling, and assisting in individual case management.

17. PEDREIRA's job performance was outstanding through her employment with KBHC. PEDREIRA's six month performance evaluation lauded her "exceptional skills" and noted that she worked well with staff and was a "valuable part" of the KBHC program. PEDREIRA's direct supervisor, Jack Cox, described her as a good clinician and a "wonderful person to supervise," who was "very honest and hard working" and of the "highest moral and ethical character."

18. KBHC describes itself as the oldest Southern Baptist child care ministry and the largest private residential child care provider in Kentucky. It was founded in 1869 by the Ladies Aid Society of the

Walnut Street Baptist Church, along with women from other Baptist churches in Louisville.

19. Although historically KBHC was financed primarily by contributions from Baptist churches, during the time of PEDREIRA's employment, and at present, most of KBHC's budget comes from contracts with the Commonwealth of Kentucky.

20. KBHC also receives financial contributions from the Kentucky Baptist Convention and from individual Baptist churches. It is licensed by the Commonwealth of Kentucky as a child-care and child-placing agency.

21. KBHC contracts with Commonwealth of Kentucky agencies including, but not limited to, the Cabinet for Families and Children and the Justice Cabinet, to provide services to youth. Most of the youth in the care of KBHC are either temporary or permanent wards of the Commonwealth of Kentucky and are placed at KBHC by state or county social workers.

22. KBHC receives governments funds through contracts with Kentucky state government agencies, including the Cabinet for Families and Children and the Justice Cabinet's Department of Juvenile Justice. The Kentucky General Assembly has authorized these two Kentucky agencies to distribute state funds through such contracts pursuant to its taxing and spending powers, Section 230 of the Kentucky Constitution provides that "[n]o money shall be drawn from the State Treasury, except in pursuance

of appropriations made by law." The Kentucky Constitution gives the General Assembly the powers to tax and spend. *See* Ky. Const., §§ 36(1), 171. Pursuant to these powers, the General Assembly has provided that "[t]he [C]abinet [for Families and Children] or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other necessities for such children committed to its care and custody." Ky.Rev.Stat.Ann. § 200.115(1). The General Assembly has also authorized the Cabinet for Families and Children "to expend available funds to provide for the board, lodging, and care of children . . . who are placed by the cabinet in a foster home or boarding home." Ky.Rev.Stat.Ann. § 605.120(1). The General Assembly has in fact regularly appropriated funds to the Cabinet for Families and Children and the Department of Juvenile Justice. The funds provided by the Cabinet for Families and Children and the Department of Juvenile Justice to KBHC consist both of state funds obtained from Kentucky taxpayers and of federal funds obtained by the federal government from federal taxpayers and given by the federal government to the Commonwealth of Kentucky.

23. The Commonwealth of Kentucky pays for most of the services provided to youth in the care of KBHC, including adolescent youth at Spring Meadows Children's Home. The Commonwealth of

Kentucky also pays for the salaries of most KBHC employees, and paid the salary for PEDREIRA's position while she was employed at KBHC.

24. KBHC elects its trustees in accordance with the conditions and bylaws of the Kentucky Baptist Convention. It maintains a close relationship with the Kentucky Baptist Convention and is committed to the same purposes, interests and concerns as the Convention. KBHC reserves its leadership positions for those who are professing Christians and active members of the Baptist Church. Among the KBHC positions so restricted are: President, Executive Assistant to the President, Vice President of Development/ Communications, Vice President of Program Services, Regional Administrators, Cornerstone Counseling Directors, Director of Religious Life, and Special Representatives to the President.

25. KBHC's mission statement declares: "Kentucky Baptist Homes for Children provides care and hope for hurting families and children through Christ-centered ministries. . . . We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values."

26. On information and belief, KBHC seeks to instill its version of Christian values and teachings to the youth in its care by, among other things, taking the youth to Baptist church services, hiring only staff who model KBHC's version of Christian values and

lifestyles, denying the youth access to healthy adult gay and lesbian role models, providing informal Christian training to the youth through KBHC staff, and placing foster children in Baptist foster homes. KBHC's Christ-centered mission permeates KBHC programs and the services that KBHC provides to youth in its care.

27. KBHC requires all employees to "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution."

28. William Smithwick ("Smithwick") is the President and Chief Executive Officer of Defendant KBHC. In that position, he is responsible for formulating and applying the employment policies of Defendant KBHC.

29. In or about August 1998, a photograph of PEDREIRA and her life partner appeared in a display at the Kentucky State Fair. The photograph of the couple was taken at an AIDS Walk fundraiser. Neither PEDREIRA nor her partner was aware that the photograph was on display at the State Fair until PEDREIRA was informed by KBHC co-workers. Smithwick and other members of KBHC management became aware that PEDREIRA is a lesbian as a result of the photograph.

30. In or about September 1998, the Cabinet of KBHC, which consisted of Smithwick and other members of the KBHC management team, met and discussed whether PEDREIRA should remain

employed at KBHC in light of KBHC's religious belief that homosexuality is sinful and immoral.

31. Shortly thereafter, Jack Cox informed PEDREIRA that the KBHC Cabinet decided to ask PEDREIRA to resign because she is a lesbian. PEDREIRA refused to resign. Shortly thereafter, PEDREIRA was informed that she would be terminated because her sexual orientation was inconsistent with KBHC's religious beliefs.

32. PEDREIRA and Cox decided that it would be clinically dangerous if PEDREIRA's departure were not explained to the youth in her care, who might feel abandoned if they thought her departure was voluntary, or might feel that their trust was violated unless they were told the true reason for her departure. Therefore, for therapeutic reasons, PEDREIRA agreed to explain to the youth the reason she was being fired, and she and Cox met with the young men for this purpose. PEDREIRA had never discussed her sexual orientation with any of the young men until this meeting.

33. PEDREIRA suffered great humiliation and embarrassment as a result of being forced to disclose her sexual orientation, and the fact that she was being terminated because of it, to the youth in her care. Nonetheless, she told the young men in order to protect their well-being.

34. The following day, PEDREIRA led a regularly scheduled group session with the young men. Several of them were upset because another

KBHC staff member told them that PEDREIRA, who the young men had come to trust, was no better than a murderer because she was gay and therefore deserved to be fired. Several of the youth expressed fear that they could be expelled from KBHC if they were gay. PEDREIRA did her best to calm them and tried to reassure them that they would be protected.

35. PEDREIRA suffered further humiliation and embarrassment as she helped the young men in her care understand and accept her termination and worked to repair the sense of abandonment, betrayal, and instability caused by KBHC.

36. On or about October 23, 1998, PEDREIRA met with Smithwick, who informed PEDREIRA that her employment with KBHC was being terminated because she is a lesbian. PEDREIRA was given a Termination Statement by Karen Hamilton, KBHC Vice President for Human Resources. The Termination Statement declares: "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." In a public statement to the media concerning PEDREIRA's termination, KBHC explained: "It is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

37. On the same date that PEDREIRA was terminated, KBHC management informed all KBHC employees that "in order to reaffirm and clarify our

values," the Board of Directors of KBHC had that day adopted the following employment policy:

> Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternate lifestyle, we will, however, act according to Board policy if a situation is brought to our attention.

38. KBHC's termination of PEDREIRA and its simultaneous adoption of a policy barring gays and lesbians from employment was motivated by religious reasons, thus causing KBHC to make employment decisions based on religious criteria. KBHC's decision to deny youth in its care adult role models who are gay or lesbian was motivated by the religious goal of teaching youth that homosexuality is sinful and immoral, thus causing KBHC to provide services based on religious criteria.

39. KBHC's religion-based employment policy and its attempts to impart Christian teaching about homosexuality to youth in its care conflicts with widely-recognized best practices in the child welfare field, professional norms of social work, and the best interests of youth who are entrusted to KBHC's care by the Commonwealth of Kentucky. For example, the Code of Ethics for the National Association of Social Workers states: "Social workers should not practice, condone, facilitate, or collaborate with any form

of discrimination on the basis of . . . sexual orientation. . . ."

40. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, the Kent School of Social Work of the University of Louisville and the Department of Social Work of Spalding University informed KBHC that they would no longer use KBHC as a practicum placement site for their graduate students. The decisions of the Kent School of Social Work and the Spalding Department of Social Work were endorsed by the Kentucky Association of Social Work Educators. The quality of the services that KBHC provides to youth in its care has suffered as a result.

41. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, numerous KBHC employees, including trained counselors and social workers, have resigned their positions with the agency. These include, but are not limited to, PEDREIRA's direct supervisor, a KBHC cottage supervisor, and a KBHC residential counselor.

42. Numerous individuals, including trained counselors and social workers, have been unable to apply for employment at KBHC because of the agency's religion-based and discriminatory policies. The quality of the services that KBHC provides to youth in its care has suffered as a result.

43. KAREN VANCE is a trained social worker who holds a Bachelor's degree, with a concentration in Psychology, from the University of Kentucky. She works as a senior children's social worker for the Department of Children and Family Services of Los Angeles County, where she has worked for the past fourteen years with youth like those in the care of KBHC. Her job responsibilities include performing case management, conducting crisis interventions, counseling youth and families in need, and investigating child abuse and neglect allegations. Previously, VANCE worked with youth and families in need in a residential setting.

44. VANCE seeks to relocate to the Louisville area to be closer to her aging parents. She has applied during the past year for professional positions at institutions in the Louisville area that, like KBHC, provide services to at-risk youth.

45. There are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. VANCE would like to work at KBHC. However, VANCE has not applied to KBHC because she is lesbian. VANCE knows that her application would be futile in light of KBHC's formal and well-publicized policy prohibiting gays and lesbians from employment because of KBHC's religious beliefs. Were it not futile, VANCE would make out a bona fide application for an available position at KBHC for which she is qualified.

46. Because VANCE is barred from employment with KBHC, the largest provider of services to at-risk youth in Kentucky, and because she has not been able to obtain satisfactory employment elsewhere in Louisville, she has not been able to fulfill her plans to relocate to provide increased care and company to her aging parents.

47. Despite KBHC's adoption of a religion-based employment policy and its discriminatory stance concerning homosexuality, the Commonwealth of Kentucky has continued to provide KBHC with most of its operating budget, including funds for staff positions. Defendant MILLER has continued to approve service contracts with KBHC on behalf of the Cabinet for Families and Children. Defendant STEPHENS has continued to approve service contracts with KBHC on behalf of the Justice Cabinet.

48. The Commonwealth of Kentucky's continued funding of KBHC has engendered deep political divisiveness along religious lines by creating public questioning of the Commonwealth's neutrality on religious questions.

49. One of the adolescents in PEDREIRA's care was John Doe. Doe suffered from severe emotional and behavioral disorders and had been repeatedly institutionalized prior to arriving at Spring Meadows. PEDREIRA was the first counselor who ever worked effectively with Doe, and he progressed remarkably under her care.

50. JANE and JAMES DOE wrote to KBHC and complained that their son John Doe was devastated by PEDREIRA's termination and that his care and progress had suffered from her departure. Smithwick wrote a letter to the DOES in response, stating:

> We do not believe the homosexual lifestyle is the one God intends for the human race and do not want to suggest the same to our children. . . . The purpose of our agency is to help hurting children and families through Christ-centered ministries. Having staff whose lifestyles demonstrate the opposite of the Judea-Christian values we build our mission upon working with our kids is a contradiction of who we are.

51. The DOES are Kentucky taxpayers, and they object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance against homosexuality.

52. PAUL SIMMONS is an ordained Baptist minister who taught Christian ethics at the Southern Baptist Theological Seminary in Louisville for twenty three years. He is now a clinical professor in the Department of Family and Community Medicine, and an adjunct professor in philosophy at the University of Louisville. Reverend SIMMONS is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

53. JOHANNA W.H VAN WIJK-BOS is an ordained Presbyterian minister and has been a Professor of the Old Testament at the Louisville Presbyterian Theological Seminary for more than two decades. Reverend BOS is a Kentucky taxpayer, and she objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

54. ELWOOD STURTEVANT is an ordained Unitarian Universalist minister and is the pastor of the Thomas Jefferson Unitarian Church in Louisville. Reverend STURTEVANT is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

55. BOB CUNNINGHAM was the first Louisville chairperson of the Kentucky Alliance Against Racism and Political Repression, and currently sits on the Alliance's Board of Directors. CUNNINGHAM, who is retired, is a member of Young's Chapel, African Methodist Episcopal (AME) of Louisville. CUNNINGHAM is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

56. All Plaintiffs are federal taxpayers and object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and

discriminatory stance concerning homosexuality and, as both federal taxpayers and state taxpayers (with the exception of Plaintiff Vance), object to the receipt and use of taxpayer funds by KBHC in light of the fact that it is pervasively sectarian and the fact that it uses taxpayer dollars for religious indoctrination.

57. KBHC is pervasively sectarian. The Baptist Children's Messenger, a publication of KBHC, says that KBHC's "efforts include permeating the environment of KBHC's programs with Christian influences such as music, magazines and Bibles, and giving children opportunities to explore spiritual matters in many different ways: Mid-week Bible studies, mission trips, camp and Christian concerns are some of the things KBHC strives to offer." As reflected in that statement, religion permeates all aspects of the lives of the youth in KBHC's care. Religion permeates their treatment, as demonstrated by statements of Jay Close, KBHC's regional minister for the Louisville area: "The goal is to integrate religious or spiritual aspects into the treatment of every child or family member that KBHC services. What we have to do is to confront them with their need for God and attempt to bring spiritual matters into their lives." Religion also permeates their extracurricular activities, such as Christian camps and speakers. Moreover, there is reason to believe that there is evidence of religious iconography on display at KBHC, and evidence that KBHC leads its staff in prayer during staff meetings. Such pervasive sectarianism is consistent with the message that KBHC sends to the community at large

on its website: "We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values." It is also consistent with the message that KBHC sends to the community at large through its employees: "Kentucky Baptist Homes for Children is a ministry operated under the direction of a board of directors elected by the Kentucky Baptists Convention. Our mission is to provide care and hope for hurting families and children through Christ-centered ministries. Every employee is a role model for the children and families under Kentucky Baptist Homes for Children's care, therefore, employees are expected to exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution. Kentucky Baptist Homes for Children prohibits personal behavior which . . . interferes with KBHC's pursuit of its Christian mission and purpose." As summed up by KBHC's President William Smithwick in a news release, "[KBHC's] mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent."

58. The contracts between KBHC and the Commonwealth do not restrict the use to which taxpayer dollars may be put. The Commonwealth does not prohibit the use of taxpayer dollars by KBHC for

religious purposes. No safeguards, statutory, administrative, or otherwise, exist to prevent KBHC from putting government funds to religious uses. The Commonwealth does not monitor KBHC to ensure that KBHC is not using government funds to finance religious activity. KBHC does not in any way attempt to use only private funds to pay for religious activity. KBHC uses government funds to pay the salaries of employees who engage in religious indoctrination and other religious activities as part of their duties at KBHC.

59. KBHC actually uses taxpayer dollars for religious activities, instruction, and indoctrination. For example, according to the Baptist Children's Messenger, KBHC's "goal is to keep Kentucky Baptist Homes for Children a Christ-centered agency, not just in name, but in practice." It quotes Mike Dixon, KBHC's Vice President for Religious Life, as saying, "It isn't too difficult to convince children that God exists. Kids are looking for someone, or something to believe in. What we have to do is give them an appropriate image of God. If they hear that and absorb it, most of them will give him a shot." It further quotes Dixon as saying that, of late, KBHC feels "a sense of urgency" in providing the "opportunity to experience God and accept Christ." Through an annual report, KBHC's President William Smithwick has made clear that KBHC dedicates staff resources to this goal: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made

decisions about their relationships with Jesus Christ. Because of that, we are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families. We already have one of these positions filled." This specific dedication of staff resources supplements the religious indoctrination of the youth in KBHC's care that already occurs during the course of a typical day through KBHC's direct care counselors and other staff. In addition, KBHC pressures and coerces the youth in its care to attend Baptist church services twice a week, regardless of whether they are Baptist or even Christian. KBHC also leads the youth in its care in Christian prayer before meals; provides Bibles and other Christian literature to the youth in its care; has relationships with local churches that "come to campuses to lead Bible studies or to distribute Bibles and other materials;" makes efforts to increase the likelihood of child placement with Baptist families; and otherwise engages in religious indoctrination of the youth in its care – all regardless of whether the youth in its care are Baptist or even Christian.

60. After they learned of the circumstances of Plaintiff Pedreira's termination, Defendants Miller and Stephens decided to terminate the contractual relationship between KBHC and the Commonwealth because they believed that KBHC's religious views on homosexuality were compromising the quality of care that KBHC was providing to the youth in its care. They further believed that a continued contractual

relationship "[could] be construed as putting us in the position of endorsing – or at least through our funding – giving some sort of state sanction to a religious practice." At the eleventh hour, however, Governor Paul Patton, a Southern Baptist, overruled their decision at the request of KBHC and the Baptist community at large.

FIRST CLAIM FOR RELIEF

Violation of the Establishment Clause of the First Amendment, U.S. Constitution (Against Defendants Miller, Stephens and Kentucky Baptist Homes for Children)

61. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 60 as if fully set out herein.

62. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Clause is applicable to the states and their political subdivisions through the Fourteenth Amendment of the U.S. Constitution.

63. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC staff positions that are filled in accordance with religious tenets constitutes a violation of the Establishment Clause.

64. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitutes a violation of the Establishment Clause.

65. The conduct of the Commonwealth of Kentucky described above has deprived and continues to deprive Plaintiffs of their rights, as taxpayers, that are protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983.

66. KBHC is named as a defendant in this claim, pursuant to Federal Rule of Civil Procedure 19, because in its absence complete relief cannot be afforded to Plaintiffs and because KBHC claims an interest relating to the subject of this action and its absence may as a practical matter impair or impede its ability to protect that interest.

67. As a result of Defendants' violations of Plaintiffs' rights as taxpayers, Plaintiffs are entitled to (1) a declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC; (2) an order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services so long as they seek to instill Christian values and teachings to youth in KBHC's care; (3) an order requiring KBHC to reimburse the

Commonwealth of Kentucky for all Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof; and (4) an award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF

Violation of KRS § 344.040(1) (Religion-Based Employment Discrimination) (By Plaintiffs Pedreira and Vance Against Defendant KBHC)

68. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in Paragraphs 1 through 67 as if fully set out herein.

69. KRS § 344.040(1) makes it an unlawful practice for an employer to discharge an employee, or to refuse to consider an applicant for employment, because of religion.

70. As President and Chief Executive Officer of KBHC, Smithwick is an agent of KBHC.

71. ALICIA PEDREIRA was discharged because of her failure to hold and adhere to the religious beliefs of Defendant KBHC and Smithwick concerning homosexuality, in violation of KRS § 344.040(1). Were it not for the impermissible religious motivation of Defendant KBHC and Smithwick, acting as an

agent for KBHC, PEDREIRA would not have been discharged.

72. At the time PEDREIRA was discharged, her job performance was highly satisfactory. She dutifully and faithfully performed her employment duties.

73. As a direct and proximate result of her unlawful discharge by Defendant KBHC and Smithwick, acting as an agent of KBHC, PEDREIRA has suffered and continues to suffer emotionally from humiliation and embarrassment.

74. As a direct and proximate result of the actions of Defendant KBHC and Smithwick, acting as an agent of KBHC, in unlawfully discharging PEDREIRA, she has suffered and continues to suffer other damages, including but not limited to past and future compensation; lost life insurance, health insurance, long- and short-term disability benefits; expenses involved in seeking other suitable employment; and attorney fees and costs.

75. KBHC will not consider KAREN VANCE for employment because of her failure to hold and adhere to KBHC's religious beliefs concerning homosexuality, in violation of KRS § 344.040(1), even though there are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. Were it not for the impermissible religious motivation and gross and pervasive discrimination of KBHC, VANCE would submit a bona fide application for employment.

76. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally, among other reasons, because she cannot fulfill her plan to relocate to Louisville and provide increased care and company to her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

THIRD CLAIM FOR RELIEF

Violation of 42 U.S.C. §2000e-2(a)(1)
(Religion-Based Employment Discrimination)
(By Plaintiff Vance Against Defendant KBHC)

77. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 76 as if fully set out herein.

78. 42 U.S.C. §2000e-2(a)(1) makes it an unlawful practice for an employer to refuse to hire an employee because of religion.

79. KAREN VANCE is barred from employment by KBHC because of her failure to hold and adhere to the religious beliefs of Defendant KBHC concerning homosexuality, in violation of 42 U.S.C. §2000e-2(a)(1). Were it not for the impermissible religious motivation and gross and pervasive discrimination of Defendant KBHC, VANCE would submit a bona fide application for a professional position at KBHC for which she is qualified.

80. KBHC has sought applicants for professional positions for which VANCE is qualified. VANCE would like to work for KBHC, but her application for employment with KBHC would be futile because VANCE is lesbian and therefore is barred from employment with KBHC.

81. The effect of KBHC's policy and practice of discriminating in employment on the basis of religion has been to deprive VANCE of equal employment opportunities.

82. VANCE is now suffering and will continue to suffer irreparable injury from KBHC's policy, practice and specific acts of discrimination as set forth herein.

83. Within 180 days of the occurrence of the acts alleged above, charges of discrimination were filed with the Equal Employment Opportunity Commission by VANCE. VANCE is awaiting receipt of her Right-to-Sue letter.

84. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally because she cannot be reunited with her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

REQUEST FOR RELIEF

All Plaintiffs request a jury trial on all matters so triable.

All Plaintiffs except Plaintiff VANCE request the following relief:

1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;

2. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;

3. An order requiring KBHC to reimburse the Commonwealth of Kentucky for any Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof;

4. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. §1988;

5. Such other relief as the Court deems just and appropriate.

Plaintiff PEDREIRA requests the following additional relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

3. An award of costs, including reasonable attorney's fees, pursuant to KRS §344.450.

4. Such other relief as the Court deems just and appropriate.

Plaintiff VANCE requests the following relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. An order declaring that KBHC's policy barring lesbians and gay men from employment violates 42 U.S.C. §2000e-2(a)(1) because it constitutes employment discrimination because of religion;

3. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

4. An award of costs, including reasonable attorney's fees, pursuant to KRS §340.450 and 42 U.S.C. §2000e *et seq*.

5. Such other relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Kenneth Y. Choe

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COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES
PRIVATE CHILD CARE AGREEMENT

THIS AGREEMENT, made and entered into as of the 1st day of July, 2004, by and between the Commonwealth of Kentucky, Cabinet for Health and Family Services, hereinafter referred to as the Cabinet, and

Kentucky Baptist Homes for Children
10200 Linn Station Road, Suite 200
Louisville KY 40223
(502) 245-2101

Hereinafter referred to as the Agency,

To provide **Residential Treatment Program (Institution)**
Foster Placement Services (Foster Care, Therapeutic Foster Care, Independent Living services)

* * *

2 THE AGENCY AGREES TO PERFORM THE SERVICES AS FOLLOWS:

2.1 Services to Families and Children

Accept selected children that are referred by the Cabinet to their Agency for services and/or care in accordance with the Agency's Application to Provide Private Child Care Services to provide the following: ***Residential Treatment Program, Foster Care, Therapeutic Foster Care, Independent Living services.***

A. The Application is on file with the Cabinet for Health and Family Services and the Agency;

B. Document the Agency's action on each referral by completing Section G. of the CLIENT INTERAGENCY PCC REFERRAL FORM THE CABINET – 886, and sending it back to the Cabinet's office that made the referral;

C. Provide such child or children with a family type environment, including adequate food, shelter, clothing (except, as otherwise provided by the Cabinet under this agreement), incidental expenses, affection, training, recreation, education, and opportunities for religious, spiritual, or ethical development in the faith of the child's choice;

D. Provide each committed child with personal allowance of at least those amounts shown in Attachment A, and document the disbursements. Personal allowances are an entitlement of the child and may not be disbursed as contingent upon the child's behavior or taken or withheld as a means of punishment. This does not preclude reasonable restitution for intentional damage to property.

E. Admit all clients entering this program according to the needs of the child, the capacity of the Agency to meet those needs; and the program; type of commitment will not be a factor.

F. Prohibit the use of Corporal Punishment for children in the custody of the Cabinet as specified in 922 KAR 1:300, and 922 KAR 1:310.

G. Agree to report to the child's Cabinet social service worker and parent (when appropriate) within twenty-four (24) hours, or the next working day, any critical incidents. Critical incidents are defined as: 1) possession of deadly weapon, 2) serious injury requiring professional medical attention, to residents or staff, resulting from a conflict with a child, 3) AWOL, 4) suicide attempts requiring professional medical attention, and 5) criminal activity by a child requiring notification of law enforcement.

H. Agree to report to the Cabinet immediately the death of a child, psychiatric/medical hospital hospitalization, and allegations of child abuse/neglect. Such reports shall be made to the child's Cabinet social service worker. In situations involving reports of suspected child abuse/neglect, the Cabinet for Health and Family Services, Division for Licensing and Regulation, Office of the Inspector General shall also be notified. Allegations of child abuse/neglect shall be reported in accordance with KRS 620.030 and to the Cabinet's Child Abuse Hotline at 1-800-752-6200.

I. Submit reports as requested by the Cabinet including a monthly progress report for each child receiving services and/or care under provision of this agreement to the Cabinet's local office having responsibility for planning with the Agency. These monthly progress reports may be replaced by the Cabinet's required progress reports (CRP-001 & 003) on those months where both are due.

J. Cooperate with the Cabinet's six-month review to determine the goals for children and length of stay. Justification for an extension for residential care beyond the time agreed to in the treatment plan shall be completed by the Treatment Team, which shall consist of Cabinet and provider staff.

K. Work in partnership with the Cabinet concerning the care of the children including scheduled treatment planning conferences. Participate in Cabinet Family Team Meetings and/or facilitated staffing when invited with appropriate prior notice and as the Agency has staff available.

L. Give two (2) weeks advanced notice prior to the discharge of a child which is unanticipated in the treatment plan, and prior to physically relocating a child to another address. Notice must be submitted in written form, with specific reasons for unanticipated discharge, and

recommendations for future treatment. This does not preclude medically necessary treatment (i.e. psychiatric hospitalization). The Agency shall maintain the child's placement if discharge from a hospital or detention center occurs prior to the two weeks advance notice expiring. Provide all information to the social services worker and to the next placement at the time of discharge.

M. Provide a two (2) week paid "bed hold" at the written request of the Cabinet for children furloughed from the facility or AWOL, assuring the child can return during that period of time. Paid bed holds are not applicable when an Agency transfers a child between its own programs. This may be extended at the written request of the Cabinet for two (2) additional paid weeks if medically necessary. If the absence exceeds 2 weeks (4 weeks with approved medical need), the child shall be treated as a new admission.

N. Cooperate with the Cabinet concerning the care of the children, including the assistance of staff with scheduled treatment planning conferences to meet federal and state requirements, and in plans for individual children receiving services and/or care from the Agency.

O. Provide the Cabinet's social service worker information needed to coordinate

plans and services to a child and a child's family (when appropriate) and to conduct required case reviews such as the Five (5) Day Case Planning Conference, Six (6) Month Case Planning Conference, Administrative Reviews, and Judicial Reviews;

P. Return such child or children to the authorized representative of the Cabinet at any time upon request;

Q. Provide appropriate social services to the child or children and family.

R. Inform the Cabinet social service worker prior to any off-campus employment of any child receiving services or care under provision of this agreement and screen proposed work assignments and off-campus employment for compliance with Child Labor Laws. KRS Chapter 339.

S. All personal clothing shall be given to the child, the child's social service worker, sent to the Cabinet's social service worker, or sent to a location designated by the child's social service worker within 7 days of the child's discharge from the placement. A written inventory of the child's clothing and a written accounting of the child's clothing allowance will be made available to the Child's social service worker upon request.

T. Maintain case records indefinitely in accordance with applicable laws and regulations. All other records shall be maintained at least six (6) years from the date of the last payment received for the agreement period, or until audited/ monitored and auditing/monitoring exceptions are resolved, whichever is later.

U. Develop and maintain a Life Book for each child receiving services or care under the provision of this agreement. Reimbursement of Life Book expenses is included in Attachment A, Rate Schedule.

V. The Agency agrees that Cabinet Social Service Workers conducting child abuse investigations in a non-familial Private Child Care setting have complete access to current clinical, historical, and contextual information and documentation.

W. Comply with Open Records Law as defined in KRS Chapter 61.

X. Transportation. The Agency will provide transportation regarding routine daily care within a 40 mile radius. The Cabinet's social service worker will give a one week advance notification when the Agency is to provide transportation within a 40 mile radius to appointments scheduled by the Cabinet. In addition to transportation related to routine daily care, mutually satisfactory arrangements for scheduled family visitation

and court appointments may be made between the Agency and Cabinet social service worker. The expectation would be that this is covered by the per diem.

Mutually satisfactory arrangements for scheduled visitation and court appointments or transportation needs exceeding the 40 mile radius may be made between Agency and Cabinet social service worker. The Cabinet social service worker would need to identify transportation requests a week in advance. If the Agency were able to meet the Cabinet social service worker's request, the Agency would be reimbursed $0.32 per mile beyond the 40 mile radius.

The Transportation Log will be used to track transportation expenses beyond the 40-mile radius. The Cabinet will also be completing this form and providing their logs to the regional billing clerk. PCC staff will complete the Transportation Log and submit it with their monthly billing invoice to the regional billing clerks. The regional billing clerk will compare pre-approved trips from the Cabinet's log with the invoice from the transportation log submitted by the Agency for payment.

2.2 Medical Treatment for Children

A. Inform the Cabinet's social service worker as soon as possible of any medical, dental, or surgical treatment planned or

provided for a child pursuant to this agreement;

B. Secure the necessary medical services for all children, with these services to be from physicians and other vendors participating in the Medical Assistance Program whenever possible if the child has a Medical Assistance Card. If the child is not eligible for Medical Assistance, the Agency shall direct the vendor to send any bills not covered by insurance or paid by the parents or third party sources to the Cabinet's office having case responsibility for approval. Provide documentation of medical provider's refusal to bill the Cabinet when seeking reimbursement for medical expenses paid on behalf of children placed in their care;

C. Give children all medications that have been prescribed by a physician in the amounts and at the times directed by the physician. Ensure that adequate supplies of medications and/or prescriptions go with children upon discharge.

D. Maintain the Cabinet's Medical Passport for all children in placement with the Agency. The Medical Passport shall be maintained through out the duration of the child's placement with the Agency and follows the child wherever the child is placed throughout the Agency. The Medical Passport shall be returned to

the child's Cabinet social service worker upon discharge from the Agency.

2.3 Religious and Spiritual Development Opportunities

Take affirmative action to assure that each child has the opportunity, without prejudice or penalty, for religious and spiritual development in the faith of the child or the faith of the family with whom the child resides if the child desires these types of opportunities and access can be reasonably provided in the community of residence.

2.4 Foster Parent Adoption

Agencies providing Foster Parent Adoption Services will do so in accordance with the provisions of Attachment B, Subagreement to Provide Adoption Services.

2.5 Monitoring

Permit staff of the Cabinet and persons acting for the Cabinet to monitor and evaluate services being performed under this agreement by providing access to physical facilities, foster homes, and to children for private interviews, any staff, all referrals, case records, foster and/or adoptive home studies, personnel records (except specific medical records exempt from disclosure under federal law unless a court order is obtained) and fiscal records, and documentation of service provision. This provision shall apply to all agreement services, including

subcontracted services under the control of the Agency:

Be responsible for monitoring, fiscal and/or program exceptions established by evaluation, monitoring and/or audit of this agreement, and to promptly settle any monitoring, fiscal and program audit exceptions by making direct payment, or reduction of future reimbursement, or by other methods approved by the Cabinet. Respond to any Statement of Deficiencies submitted by the Cabinet or persons acting for the Cabinet by submission of and compliance to a Corrective Action Plan based on monitoring results.

2.6 Guidelines for the Use of Restrictive Procedures

Agencies that use physical management shall have established guidelines and policies governing the use of the intervention that are consistent with accreditation standards.

Data on the use of physical management will be reported in a manner that is consistent with accreditation reporting formats and requirements to the Cabinet or its agent by the Agency in an accurate and timely manner. Each provider agrees to establish systems for tracking the frequency, location, and type of critical incidents involving physical management that occur.

When Agencies use restrictive interventions, written policy and procedure shall define an

administrative process to review all critical behavior incidents and restrictive procedures, incident by incident. Documentation of this administrative review shall record the assessment as to whether the restrictive procedure was necessary, conducted according to defined provider standards, documented and reported as required, and whether follow-up corrective action is warranted, and shall record that staff received this feedback.

Only a certified trainer who has completed a nationally recognized and professionally developed training program shall conduct crisis prevention and management training, including restraint and seclusion.

2.7 Attachment D

A. Prior to admitting any committed child to one of the Agency's foster homes, the Agency will execute a Subagreement for Foster Family Care, (Attachment D) when this is the plan of the Cabinet's social service worker. The Agency shall provide to the Cabinet, or its agent, a monthly listing of approved foster homes. The listing shall include the name, address, service region and phone number of all approved foster homes; the date the home was certified; and the date the home's certification expired; the Cabinet's children placed in each home; and for children admitted to a home since the last list, also the name of homes in

which the child was placed since the last list.

B. Any home study, child placement, record keeping, and related services shall be done in accordance with 922 KAR 1:310. Applicable records and interviews with foster parents shall be available to the Cabinet's social service workers who are planning to place a child in the home and/or providing follow-up planning services to a child in such home pursuant to KRS 605.150, 620.180(2);

C. Document, using the DSS 111A (Foster Home Contract Supplement), or a comparable form, notification to foster parent(s) of relevant child history and risk factors for the time a child is placed with one of the Agency foster homes.

* * *

Supreme Court, U.S.
FILED
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No. 09-1121

In the Supreme Court of the United States

J. MICHAEL BROWN, *et al.*,
Petitioners,

v.

ALICIA PEDREIRA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PARTIES TO THE PROCEEDINGS BELOW

The Defendants-Petitioners' statement is correct, except that, according to the institution's website, Defendant-Petitioner Kentucky Baptist Homes for Children has changed its name to "Sunrise Children's Services." The institution has taken no steps to change its name in this litigation, however, so we refer to it here as "Kentucky Baptist Homes for Children," or just "Baptist Homes."

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

This case is a challenge to the provision of state and federal funds by the Defendant-Petitioner Kentucky agencies to Defendant-Petitioner Kentucky Baptist Homes for Children, which uses those funds to support proselytization of the children whom the state agencies place at the Homes. The Defendants have repeatedly sought to preclude the Plaintiffs from litigating the merits of the case. The Petition presents only the most recent round in this effort. The questions presented by the Petition are not worthy of this Court's review.

Addressing the questions presented would be nothing more than an academic exercise that cannot affect the outcome of the case, unless the Court also decides a question that is *not* presented by the Petition. The two questions the Petition presents raise the same issue: Did the court of appeals err by holding that state taxpayers in Establishment-Clause cases need not meet the "legislative nexus" test that is applicable to federal taxpayers? But the court of appeals also held, in the alternative, that the Plaintiffs-Respondents *did* meet that test in their capacity as state taxpayers. That latter holding is not challenged by either of the Petition's two questions. And even if that alternative holding had been presented, that holding does not deserve review by this Court, because it simply involves the panel's application of existing precedent to particular facts.

On the issue that the Petition does present, there is no conflict between the panel's holding and this

Court's decisions, as this Court has never required state taxpayers in Establishment-Clause cases to meet the "legislative nexus" test.

Furthermore, the alleged "circuit split" to which the Defendants point is superficial, undeveloped, and may very well resolve itself without the Court's intervention. The Court has only recently — in 2006 and 2007 — clarified the law regarding taxpayer standing. Since then, only two circuits have analyzed whether state taxpayers must meet the "legislative nexus" test: the Seventh Circuit in *Hinrichs* v. *Speaker of the House*, 506 F.3d 584 (7th Cir. 2007), and the Sixth Circuit below. While those circuits reached opposite results, the Seventh Circuit reached its conclusion summarily, without considering the arguments presented to the Sixth Circuit. And the ultimate ruling in *Hinrichs* would have been the same regardless of whether the "legislative nexus" test had been applied, so the Seventh Circuit's conclusion on the governing test was not necessary to the outcome of the case. A subsequent panel of the Seventh Circuit may, under the Seventh Circuit's rules, reach a contrary result and thereby resolve the current circuit split. The other circuits, when confronted with this issue, may very well agree with the panel below.

Indeed, that is highly likely because requiring state taxpayers to meet the "legislative nexus" test makes little sense. The test was originally derived from the fact that the U.S. Constitution vests the federal government's power to tax and spend exclusively in Congress. But many state constitutions vest some taxing and spending powers with executive-branch officials or directly with the people (through referenda). The "legislative nexus"

test also effectuates the federal judiciary's special concern — based on the federal separation-of-powers doctrine — about interfering with the internal affairs of the co-equal federal executive branch. The separation-of-powers doctrine, however, does not apply to the federal judiciary's relationship with the States.

Finally, the merits of this case have not yet been adjudicated. Any questions about standing can and should be raised after final judgment, if they are still relevant, rather than at this interlocutory stage of the proceedings.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following statutes, set forth in the Petitioners' and Respondents' appendices, are principally relevant: Ky. Rev. Stat. Ann. §§ 199.641, 199.650, 199.801, 199.805, 200.115, 605.090, 605.100, 605.120, 605.130.

STATEMENT

Facts

The Commonwealth of Kentucky contracts with private childcare facilities to care for abused, neglected, and abandoned children. C.A. App. 495. One of these facilities is Kentucky Baptist Homes for Children, which receives the majority of its funding from the Commonwealth, including more than $100 million over the past decade. Pet. App. 88, ¶¶ 19-21; C.A. App. 264, 995.

Most of the children in the care of Baptist Homes are either temporary or permanent wards of the state. Pet. App. 88, ¶ 21. State or county social workers — not the youths or their relatives — decide

whether to place these children at Baptist Homes. *Ibid.*; see also Ky. Rev. Stat. Ann. §§ 199.801(2), 199.805, 605.090(d).

Baptist Homes indoctrinates these vulnerable youths in its religious views, coerces them to take part in religious activity, and attempts to convert them to its version of Christianity. Pet. App. 90-91, 100-103, ¶¶ 26-27, 57-59. In its own words, the institution is a "Christian ministry" that strives to "permeate[] the environment of [its] programs with Christian influences," to "confront [children] with their need for God," and to "attempt to bring spiritual matters into their lives." Pet. App. 100-101, ¶ 57. Baptist Homes pressures its child residents to attend Baptist church services, to participate in Bible studies, to say prayers before meals, and to attend religious camps and concerts. Pet. App. 100-103, ¶¶ 57, 59. A contractor retained by the Commonwealth to monitor private childcare facilities reported several hundred complaints by children (in exit interviews) about Baptist Homes' religious practices, including that the children had been denied the opportunity to practice their own religions, had been forced to attend Baptist activities, and had been pressured to become Christians. C.A. App. 327, 333, 352. And in reports to the Kentucky Baptist Convention, Baptist Homes has boasted about its successes in converting children to Christianity, announcing that "[t]he angels rejoiced [one] year as 244 of our children made decisions about their relationships with Jesus Christ." Pet. App. 102-103, ¶ 59.

Baptist Homes receives state funding for its proselytism pursuant to a comprehensive statutory scheme — consisting of at least seventeen statutes

principally enacted through two pieces of legislation in 1950 and 1986 — that authorizes and governs the funding of private childcare facilities. See 1986 Ky. Acts ch. 423 (enacting Ky. Rev. Stat. §§ 199.645, 605.090, 605.100, 605.120, 605.130, 605.150); 1950 Ky. Acts ch. 125 (enacting Ky. Rev. Stat. §§ 199.640, 199.650, 199.660, 199.670); Ky. Rev. Stat. Ann. §§ 199.641, 199.680, 199.801, 199.805, 200.115, 605.095, 605.160. The Kentucky legislature has mandated that two state agencies — the Cabinet for Health and Family Services and the Department of Juvenile Justice — provide care for neglected, abused, and delinquent children. Ky. Rev. Stat. Ann. §§ 605.100(1), 605.130. The legislature has authorized these agencies to place children in private childcare facilities and to use state funds to pay those facilities, and has established detailed standards for setting the payment rates. Ky. Rev. Stat. Ann. §§ 199.641(2), 199.650, 200.115(1), 605.090(1)(d), 605.120(1).

The Kentucky legislature has also regularly appropriated specific sums for private childcare providers, out of which the Commonwealth makes payments to Baptist Homes. Pet. App. 76, 79; Resp. App. 7a-8a; C.A. App. 373-375. What is more, the Kentucky legislature has long understood that its childcare appropriations have been financing Baptist Homes. Indeed, the legislature's 2004-2006 budget expressly directed $200,000 for one Baptist Homes facility. Pet. App. 77. Further, in 1998, a Kentucky Legislative Research Commission's report to the legislature noted that tens of millions of state dollars were being paid to private childcare providers, listing Baptist Homes as one of the providers that received a significant number of child placements from the Commonwealth. C.A. App. 481. In 2006, a chamber

of the legislature issued a "legislative citation" to Baptist Homes, praising it for its "extraordinary efforts in assisting those children within the Commonwealth in need." Pet. App. 80-81. And numerous newspaper articles have discussed Baptist Homes' extensive receipt of state funds, including front-page articles in Kentucky's largest newspaper reporting that Baptist Homes is Kentucky's largest provider of private childcare services, a fact that Baptist Homes itself confirms on its website. C.A. App. 499, 501, 505, 594-629.

Finally, as discussed in detail in the Plaintiffs-Respondents' Conditional Cross-Petition, in addition to paying Baptist Homes state funds, Kentucky pays Baptist Homes substantial amounts of federal dollars pursuant to two congressionally authorized and funded programs that are subject to a federal statute (42 U.S.C. 604a) that requires inclusion of religious organizations among funding recipients.

Proceedings

The Plaintiffs-Respondents — state and federal taxpayers — filed this action on April 17, 2000. The Taxpayers alleged that Kentucky's provision of public funding to Baptist Homes violates the Establishment Clause of the First Amendment, because the funding supports religious indoctrination of the youth in Baptist Homes' care, and because Baptist Homes is a thoroughly religious institution. Pet. App. 100-103, 105, ¶¶ 57-59, 64-65. As the district court noted, the Taxpayers brought an "as applied" constitutional challenge, akin to *Bowen* v. *Kendrick*, 487 U.S. 589, 618-622 (1988), where this Court held that taxpayers had standing to challenge particular grants that were issued under a facially constitutional federal statute. C.A. App. 96; Docket

Entry 124, Aug. 27, 2003, at 2; Docket Entry 131, Nov. 17, 2003, at 2.

On April 18, 2002, the Defendants filed motions to dismiss the Taxpayers' Establishment-Clause claims based on standing. Docket Entries 82-83. On April 16, 2003, the district court denied that motion while allowing the Taxpayers to file an Amended Complaint. C.A. App. 225-27. On July 31, 2006, the Taxpayers sought leave to file a Second Amended Complaint that would have added new substantive allegations, but the district court denied the request. C.A. App. 229, 310.

On August 10, 2007, shortly after this Court issued its decision in *Hein* v. *Freedom From Religion Foundation*, 551 U.S. 587 (2007), the Defendants filed a new round of motions to dismiss challenging the Taxpayers' standing. Docket Entries 275-276. On September 18, 2007, in response to attacks in the Defendants' motions against the adequacy of the Amended Complaint, the Taxpayers sought leave to file a new Second Amended Complaint. C.A. App. 772-778. This time, the proposed amendments were limited to clarifying the Taxpayers' allegations relating to standing, by adding details about the statutes and appropriations supporting the funding of Baptist Homes and expressly confirming that the Taxpayers are challenging these statutes and appropriations "as applied." Cross-Pet. App. 23a-25a, ¶¶ 22, 66; C.A. App. 772-775, 787, 826.

On March 31, 2008, the district court granted the Defendants' motions to dismiss for lack of standing, apparently concluding that the Taxpayers had to show that the Kentucky legislature made a "particular appropriation" to Baptist Homes, and ignoring that the legislature did in fact make such an

appropriation. Pet. App. 47. The district court also denied the motion to amend, solely on futility grounds. Pet. App. 31.

On August 31, 2009, a unanimous panel of the court of appeals reversed the district court's ruling. The court of appeals held that the Taxpayers satisfied the test for Establishment-Clause state-taxpayer standing formulated in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), as they alleged that substantial amounts of state dollars have been funding Baptist Homes' religious indoctrination in violation of the Establishment Clause. Pet. App. 19-20. The court concluded that it was not necessary for state taxpayers to satisfy the "legislative nexus" test applicable to federal taxpayers under *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968), explaining that there was a lack of authority to support applying that test on the state level. Pet. App. 21-22.

The court of appeals further held that even if the "legislative nexus" test were applicable to state taxpayers, the Taxpayers (as state taxpayers) satisfied the test. Pet. App. 22-23. The court cited the Kentucky statutes that authorized state funding of private childcare facilities, the Kentucky legislature's direct appropriation of state funds to Baptist Homes, and the legislature's long-standing knowledge that its funds were going to Baptist Homes. Pet. App. 19-20, 22-23. The court noted that this case "falls squarely within the line of cases where the Supreme Court and our sister circuits have upheld taxpayer standing when grants, contracts, or other tax-funded aid are provided to private religious organizations pursuant to explicit legislative authorization." Pet. App. 23.

The court of appeals also concluded that the Taxpayers did not have standing as federal taxpayers to challenge the federal funding of Baptist Homes, a matter discussed further in the Taxpayers' Conditional Cross-Petition. Pet. App. 18. The court reversed the district court's denial of the Taxpayers' motion to amend the allegations in their complaint relating to standing, a ruling that the Defendants do not challenge in their Petition. Pet. App. 24. Finally, the court affirmed the district court's dismissal of statutory employment-discrimination claims brought against Baptist Homes by two of the Plaintiffs (Pet. App. 12), a ruling on which we do not cross-petition.

On December 16, 2009, the court of appeals denied petitions filed by the Defendants for rehearing en banc. Pet. App. 52-53. Not a single judge requested a vote on the petitions. Pet. App. 52.

REASONS FOR DENYING THE PETITION

I. This case presents an exceedingly poor vehicle for this Court to address whether the "legislative nexus" test applies to state taxpayers.

Addressing the "Questions Presented" in this case would be a purely academic exercise. Even if that were not so, there is no good reason for the Court to take up the Questions Presented at this time, for the panel's holding on them conflicts with no decision of this Court, and any circuit split that exists is cursory and undeveloped.

A. Adjudicating the questions presented in the Petition would be a purely academic exercise, unless the Court were also to decide an issue that the Petition does not present.

The first of the two "Questions Presented" in the Petition is "Does *Flast v. Cohen*'s 'legislative enactment' nexus test apply to State taxpayers as it does to federal taxpayers?" Pet. ii. The second is "Does Article III confer upon the federal courts broader authority to address alleged Establishment Clause violations by State Legislatures than those same courts have to address alleged Establishment Clause violations by Congress?" *Ibid.* The second question is nothing more than a rhetorical restatement of the first. Both questions attack only the panel's holding that state taxpayers need not meet the "legislative nexus" test. Neither challenges the panel's alternative holding that the Taxpayers (as state taxpayers) satisfied that test.

But unless the Court addresses that alternative holding, consideration of whether state taxpayers must satisfy the "legislative nexus" test will be nothing more than an academic exercise that cannot affect the outcome of the case. See *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224, 236 (2007); *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983). And the Defendants have failed to bring that alternative holding before the Court, placing it outside the Court's purview. See Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

Even if the Court were to deem the alternative holding to be properly presented by the Petition, that holding is unworthy of review because it raises

nothing more than the question whether the panel properly applied existing precedent to a particular set of facts. See Section II, *infra*.

B. The Sixth Circuit's ruling on whether the "legislative nexus" test applies to state taxpayers does not conflict with any decision of this Court.

Even if the Court were inclined to overlook the procedural problems with addressing the applicability of the "legislative nexus" test here, the issue is not worthy of the Court's review. There is no conflict between the panel's ruling and any decision of the Court. There is also no mature circuit split supporting certiorari. See Section I(C), *infra*. We discuss this Court's decisions before those of the circuits, for the former aid understanding of the latter.

The Court has expressly upheld the standing of state taxpayers in three Establishment-Clause cases, but in none of those cases did the Court hold that state taxpayers must demonstrate a link between challenged expenditures and legislative action. See *School District* v. *Ball*, 473 U.S. 373, 380 n.5 (1985), overruled in part on other grounds by *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Marsh* v. *Chambers*, 463 U.S. 783, 786 n.4 (1983); *Meek* v. *Pittenger*, 421 U.S. 349, 356 n.5 (1975), overruled on other grounds by *Mitchell* v. *Helms*, 530 U.S. 793 (2000). The Court has also adjudicated numerous other state-taxpayer Establishment-Clause suits without discussing standing at all, much less requiring the taxpayers to satisfy the "legislative nexus" test. See, *e.g.*, *Mueller* v. *Allen*, 463 U.S. 388, 392 (1983); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 744 (1976); *Hunt* v. *McNair*, 413 U.S. 734, 735 (1973); *Sloan* v. *Lemon*,

413 U.S. 825, 827 (1973); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 762 (1973); *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472, 478 (1973); *Lemon* v. *Kurtzman*, 403 U.S. 602, 608, 610-611 (1971).

Nonetheless, the Defendants contend that five decisions of this Court have required federal and state taxpayers to be treated identically in all circumstances: *Doremus*, 342 U.S. 429; *Flast*, 392 U.S. 83; *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989); and *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006). The Court held no such thing in any of these cases.

Doremus. In *Doremus*, the Court held that a state taxpayer did not have standing to challenge a state statute that called for Bible-reading at the beginning of each school day. 342 U.S. at 435. The Court explained, "[t]here is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." *Id.* at 433. The Court distinguished *Everson* v. *Board of Education*, 330 U.S. 1, 3, 5, 17 (1947) — where the Court adjudicated a state taxpayer's challenge to a statute authorizing the use of state funds to transport students to parochial schools — explaining that "*Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434. What was fatal to standing in *Doremus* thus was not the lack of a "legislative nexus" — indeed, the taxpayer's challenge was directed at a

legislative enactment — but the lack of any substantial spending on the challenged activity.

Flast. In *Flast*, the Court held that federal taxpayers had standing to bring an Establishment-Clause challenge to the implementation of a federal statute providing aid to children in public and private schools. 392 U.S. at 103. The Court ruled that *federal* taxpayers have standing when two conditions are met. *Id.* at 101-104. One of these — which we call the "injury nexus" — is that taxpayers "establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Id.* at 102. The Court explained that Establishment-Clause claims satisfy this requirement because a principal purpose of the Clause was to prevent the use of government funds to support religion. *Id.* at 103-104. The second requirement — which we call the "legislative nexus" — is that taxpayers challenge "exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Id.* at 102. The Court did not discuss state-taxpayer standing at all, except when it noted that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute," and explained that this restriction "is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus*." *Ibid.*

Moose Lodge. In *Moose Lodge*, the Court briefly rejected an argument that a plaintiff's status as a state taxpayer could support jurisdiction for an injunction requiring a state liquor-board to revoke the license of a discriminatory club. 407 U.S. at 167. The Court merely noted that *Doremus* requires that

challenged expenditures be more than "incidental," and that, unlike in *Flast*, no Establishment-Clause claim was involved. *Ibid.* The Court did not rely on any failure to show legislative action.

ASARCO. In *ASARCO*, 490 U.S. at 613-614, a plurality of the Court concluded that — like federal taxpayers (see *Massachusetts* v. *Mellon*, 262 U.S. 447, 487 (1923)) — state taxpayers generally lack standing to challenge expenditures of tax funds. The opinion did not discuss standing in Establishment-Clause cases, however.

DaimlerChrysler. In *DaimlerChrysler*, 547 U.S. at 346, a 2006 Commerce-Clause challenge to a state tax credit, the Court as a whole agreed with the *ASARCO* plurality's conclusion. The Court reasoned that state taxpayers, like their federal counterparts, have only a minute interest in state treasuries. *Id.* at 343-345. The Court distinguished its precedents approving standing in Establishment-Clause challenges, explaining that — unlike the Commerce Clause — the Establishment Clause was specifically intended to prevent injury to taxpayers. *Id.* at 348. In other words, the Court concluded that the state taxpayers before it could not satisfy *Flast*'s "injury nexus." The Court had no reason to decide, and thus did not address, whether state taxpayers must satisfy *Flast*'s "legislative nexus" — the plaintiffs lacked standing "[q]uite apart from whether the [challenged] tax credit is analogous to an exercise of congressional power under Art. I, § 8." *Id.* at 347.[1]

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[1] Contrary to the Defendants' contention (cf. Pet. 18), *DaimlerChrysler* did not hold that municipal taxpayers must meet the "legislative nexus" test. In fact, the Court reaffirmed

Hein. In its 2007 decision in *Hein*, 551 U.S. 587, the Court denied federal taxpayers standing to mount an Establishment-Clause challenge to conferences that were presented by the federal executive branch — and supported by general funds not designated by Congress for any particular purpose — during which executive-branch officials gave speeches that used religious imagery and praised faith-based social-service providers. 551 U.S. at 592, 595-596. While the Defendants cite *Hein* often, they do not claim that *Hein* required state taxpayers to meet the "legislative nexus" test. In fact, *Hein* did not discuss the standards for state-taxpayer standing. But, as explained below in Section I(D), *Hein* did clarify the legal principles underlying the "legislative nexus" test — principles that cannot justify importing the test into the state-taxpayer context.

C. There is no circuit conflict justifying certiorari.

Since *DaimlerChrysler* and *Hein* were decided, only one court of appeals, other than the Sixth Circuit, has even analyzed whether state taxpayers must meet the "legislative nexus" test in Establishment-Clause cases. And that circuit — the Seventh — failed to consider whether the principles underlying the test support applying it at the state level. The other circuits cited by the Defendants — the Second, Fifth, Eighth, Ninth, and Eleventh —

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that municipal taxpayers have general standing to challenge unlawful uses of municipal funds. 547 U.S. at 349. The Court merely ruled in *DaimlerChrysler* that because the taxpayers challenged state and not local decision-making, the lenient municipal-taxpayer test was inapplicable. *Id.* at 349-350.

have not analyzed the question at all. Thus there is no developed circuit split on the question.

Seventh Circuit. The only post-*DaimlerChrysler* circuit opinion, other than the panel's decision below, that has actually considered whether state taxpayers must satisfy the "legislative nexus" test in Establishment-Clause cases is *Hinrichs*, 506 F.3d 584. There, state taxpayers challenged the sectarian nature of prayers at the openings of sessions of the Indiana House of Representatives. *Id.* at 586-587. The Seventh Circuit held that the taxpayers had to meet the "legislative nexus" test, and that they had failed to do so. *Id.* at 598-599. But the taxpayers' claim for standing was also quite weak under the more generous *Doremus* test applied by the Sixth Circuit below. The expenditures at issue were "minimal" ("$8.46 per prayer"), not necessary for the administration of the prayer practice, and unrelated to the sectarian nature of the prayers. *Id.* at 587, 598; *id.* at 603 (Wood, J., dissenting). Under *Doremus*, these outlays would likely have been treated as "incidental expenditures" insufficient for standing. See *Flast*, 392 U.S. at 102 (explaining *Doremus*, 342 U.S. 429).

Hinrichs' conclusion that state taxpayers must satisfy the "legislative nexus" test not only was unnecessary to the outcome of the case but also was not founded on any in-depth analysis. The Seventh Circuit merely accepted the argument the Defendants make here — that because *DaimlerChrysler* applied the same rule to state taxpayers that applies to federal taxpayers outside the Establishment-Clause context, these two types of taxpayers should be treated identically in Establishment-Clause cases too. *Id.* at 595-598.

Hinrichs summarily reached that conclusion without considering whether the principles upon which the "legislative nexus" test is based are even applicable to state taxpayers. Those principles — which were clarified in the Court's 2007 decision in *Hein* — in fact do not support applying the test at the state level. See Section I(D), *infra*. Because *Hinrichs*' contrary conclusion was neither needed for the outcome of the case nor based on substantial analysis, a future panel of the Seventh Circuit may very well bring the circuit into alignment with the Sixth.[2]

Second Circuit. In *Board of Education* v. *New York State Teachers Retirement System*, 60 F.3d 106, 110 (2d Cir. 1995), which was not even an Establishment-Clause case, the Second Circuit ruled (as *DaimlerChrysler* did subsequently) that state taxpayers, like federal taxpayers, do not have general standing to challenge government action merely by virtue of their status as taxpayers. The Second Circuit has not analyzed, however, whether state taxpayers must meet the "legislative nexus" test in Establishment-Clause cases.

Fifth Circuit. The Fifth Circuit has not had an opportunity to consider state-taxpayer standing in an Establishment-Clause case since *DaimlerChrysler* and *Hein* were decided. Earlier Fifth Circuit cases had held that state taxpayers should be treated like federal taxpayers in non-Establishment-Clause

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[2] In the Seventh Circuit, a panel can overrule a prior panel so long as the proposed opinion is circulated to the en banc court and a majority of the judges do not vote for en banc hearing. 7th Cir. R. 40(e).

cases, but that in Establishment-Clause cases they need only show — in accordance with *Doremus* — that "tax revenues are expended on the disputed practice." See *Ward* v. *Santa Fe Independent School District*, 393 F.3d 599, 606 (5th Cir. 2004); *Henderson* v. *Stadler*, 287 F.3d 374, 379-381 & n.7 (5th Cir. 2002); *Doe* v. *Duncanville Independent School District*, 70 F.3d 402, 408 (5th Cir. 1995).

Eighth Circuit. Prior to *DaimlerChrysler* and *Hein*, Eighth Circuit decisions likewise had held that state taxpayers in Establishment-Clause cases "must only show that there has been a disbursement of tax money in potential violation of constitutional guarantees." *Minnesota Federation of Teachers* v. *Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989); see also *Pulido* v. *Bennett*, 848 F.2d 880, 885 n.8, 886 (8th Cir. 1987), modified on other grounds, 860 F.2d 296 (8th Cir. 1988). The Eighth Circuit had also held, consistently with *DaimlerChrysler*, that state taxpayers lack standing in non-Establishment-Clause cases. See *Booth* v. *Hvass*, 302 F.3d 849, 854 (8th Cir. 2002); *Tarsney* v. *O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000). After *DaimlerChrysler* and *Hein* were decided, in *Americans United for Separation of Church & State* v. *Prison Fellowship Ministries*, 509 F.3d 406, 420 (8th Cir. 2007), the Eighth Circuit noted that a legislative nexus existed in upholding the standing of a group of state taxpayers challenging a religious program in a state prison, but the court did not analyze whether state taxpayers were *required* to show such a nexus.

Ninth Circuit. Before *DaimlerChrysler* and *Hein*, the Ninth Circuit took the position that state taxpayers could challenge any improper expenditure of state funds under any provision of the U.S.

Constitution. See *Doe* v. *Madison School District No. 321*, 177 F.3d 789, 793-797 (9th Cir. 1999); *Cammack* v. *Waihee*, 932 F.2d 765, 769-770 (9th Cir. 1991); *Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1178-1180 (9th Cir. 1984). In *Arakaki* v. *Lingle*, 477 F.3d 1048, 1061-1063 (9th Cir. 2007), the Ninth Circuit recognized that *DaimlerChrysler* abrogated the circuit's prior decisions to the extent that they had permitted state-taxpayer standing in non-Establishment-Clause suits, but the Court did not determine the requirements for state-taxpayer standing in Establishment-Clause controversies.

Eleventh Circuit. In *Pelphrey* v. *Cobb County*, 547 F.3d 1263, 1280-1281 (11th Cir. 2008), the Eleventh Circuit upheld the standing of a group of municipal taxpayers. The court stated that "*Flast* pertains only to federal taxpayers and does not apply to municipal taxpayers." *Id.* at 1280. The court did not analyze whether it would be appropriate to apply the "legislative nexus" test to state taxpayers.

Given the paucity of analysis among the circuits on the applicability of the "legislative nexus" test to state taxpayers — and the lack of any analysis at all about whether the legal principles underlying the test support importing it to the state level (a question we discuss next) — it would be premature for this Court to address the matter. The courts of appeals should be afforded a sufficient opportunity to assess the impact of *DaimlerChrysler* and *Hein* on state-taxpayer Establishment-Clause challenges.

D. Neither logic nor policy supports applying the "legislative nexus" test to state taxpayers.

Flast's "legislative nexus" requirement is rooted in two grounds. One of these is that in the federal system of government, the power to tax and spend is vested exclusively in Congress. See *Flast*, 392 U.S. at 102; U.S. Const. art. I, § 8. The second is the separation-of-powers doctrine. See *Hein*, 551 U.S. at 610-612 (plurality opinion). Neither of these grounds supports applying the "legislative nexus" test to state taxpayers.

Flast explained that federal taxpayers must establish a logical link between the government actions they challenge and their status as taxpayers. 392 U.S. at 102. As the exercise of taxing and spending power creates such a link, and as that power resides only in Congress at the federal level, *Flast* required federal taxpayers to show a nexus with legislative action. See *ibid.*; U.S. Const. art. I, § 8.

Many state constitutions, however, vest considerable spending or taxing power in the state governor. Nebraska, for example, gives its governor primary authority over the state budget, unless three fifths of the legislature overrule him. Neb. Const. art. IV, § 7. West Virginia gives its governor the right to amend or supplement its budget with legislative consent. W. Va. Const. art. VI, § 51. Florida grants its governor the power to reduce state spending to ensure that the state budget is balanced. Fla. Const. art. IV, § 13. The Michigan Constitution allows its governor to do the same with consent of legislative appropriations committees, and provides that "[n]o appropriation shall be a mandate to spend." Mich.

Const. art. V, § 20. And forty-three states grant their governors a line-item veto. National Conference of State Legislatures, Gubernatorial Veto Authority with Respect to Major Budget Bill(s) (2008), http://www.ncsl.org/IssuesResearch/BudgetTax/GubernatorialVetoAuthoritywithRespecttoMajor/tabid/12640/Default.aspx.

Some state constitutions provide taxing and spending power directly to the people, through referenda. The constitutions of Arizona and Ohio provide the people with power to adopt or reject any item in any appropriations bill. Ariz. Const. art. XXI; Ohio Const. art. II, § 1(a). And Kentucky itself requires certain kinds of taxing and spending measures to be ratified by popular vote. Ky. Const. § 50.

It makes little sense to apply to state taxpayers a test derived from a federal constitutional regime that is quite different from the states' constitutional structures. To be sure, state taxpayers must establish standing under Article III of the U.S. Constitution to have their claims adjudicated in federal court, but the test for whether they have done so cannot legitimately turn on a provision of the U.S. Constitution that governs the U.S. Congress alone.

The second principle supporting the "legislative nexus" test is, as explained in *Hein*, the separation-of-powers doctrine — in particular, a special concern about intrusion by the federal judiciary on the internal, day-to-day operations and speech of the federal executive branch. See 551 U.S. at 610-612 (plurality opinion); *id.* at 615-618 (Kennedy, J., concurring). *Hein*'s emphasis of the separation-of-powers doctrine was consistent with earlier decisions

of this Court that denied standing based on separation-of-powers concerns when the federal judiciary was asked to intervene in internal executive-branch operations. See *Allen* v. *Wright*, 468 U.S. 737, 752, 759-761 (1984); *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129-132 (1940).

As the Court has repeatedly recognized, however, the "separation-of-powers principle * * * has no applicability to the federal judiciary's relationship to the States." *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976) (plurality opinion). For example, in *United States* v. *Gillock*, 445 U.S. 360, 370 (1980), the Court held that limits applicable to federal prosecutions of members of Congress did not apply to federal prosecutions of state legislators, in part because those limits were based on the federal separation of powers. In *Baker* v. *Carr*, 369 U.S. 186, 210, 217, 226 (1962), the Court held that the political-question doctrine did not bar federal courts from adjudicating the constitutionality of the apportionment of state election districts, because the political-question doctrine is based on the separation of powers. See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (noting that State could not invoke separation-of-powers doctrine against federal government in challenge to Voting Rights Act). Thus the separation-of-powers doctrine does not support applying the "legislative nexus" test to state taxpayers.[3]

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[3] In contrast, the rationale supporting *Flast*'s "injury nexus" test — that a taxpayer must be suing under a constitutional clause aimed at preventing injury to taxpayers (see 392 U.S. at 102-103) — applies with equal force to state and federal taxpayers. It is the clause that taxpayers are suing

The Defendants contend that failing to use the "legislative nexus" test at the state level will cause the Establishment Clause to apply more onerously to the States, and that such a result would be inconsistent with federalism principles. Pet. 29. But the substantive prohibitions imposed by the Establishment Clause on federal and state governments are the same regardless of any standing rules. And government officials have a duty to comply with the Constitution regardless of whether anyone has standing to sue them. See, *e.g.*, *Hein*, 551 U.S. at 618 (Kennedy, J., concurring).

Moreover, any limits that federalism principles may impose on state-taxpayer standing would have no connection to whether the moving force behind challenged spending is legislative or executive. In contrast to the special concerns expressed about judicial oversight of the federal executive branch in this Court's separation-of-powers jurisprudence, this Court's federalism cases have singled out state judicial bodies, not state executive or state legislative conduct, for special protection. See *Kelo* v. *City of New London*, 545 U.S. 469, 482 (2005); *Growe* v. *Emison*, 507 U.S. 25, 35-36 (1993); *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985); *Gregg* v. *Georgia*, 428 U.S. 153, 186-87 (1976); *Rizzo* v. *Goode*, 423 U.S. 362, 380 (1976); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *Lemon* v. *Kurtzman*, 411 U.S. 192, 208 (1973).

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under, not whether they are federal or state taxpayers, that determines whether they are injured. Accordingly, the Court in *DaimlerChrysler*, 547 U.S. at 348, applied *Flast*'s "injury nexus" to determine that state taxpayers lack standing to sue under the Commerce Clause.

Declining to require state taxpayers to meet the "legislative nexus" test will not, as the Defendants hyperbolically contend, "[j]eopardize[] the [f]ederal-[s]tate [s]ocial [s]ervices [f]unding system." Cf. Pet. 31. Otherwise, the social-services system would surely have already collapsed in the States covered by the Fifth, Sixth, Eighth, and Ninth Circuits, for all these circuits have long used the same *Doremus* test to decide whether state-taxpayer standing exists in Establishment-Clause cases that the panel used below and that the Defendants contend is too lenient. See Section I(C), *supra*; see also *Johnson* v. *Economic Development Corp.*, 241 F.3d 501, 507-508 (6th Cir. 2001); *Hawley* v. *City of Cleveland*, 773 F.2d 736, 742 (6th Cir. 1985). The Defendants do not claim that these circuits have been inundated with lawsuits challenging public funding of religious social-service providers, and in fact no such thing has occurred.

The Defendants also express concern that failure to apply the "legislative nexus" test to state taxpayers would allow such taxpayers to "[c]ircumvent *Flast*'s [r]equirements" when challenging federal funding that is passed through state governments. Pet. 34. This argument assumes that state taxpayers need only meet the test for *state*-taxpayer standing when challenging a state's use of *federal* funds, an issue has not been litigated or decided in this litigation or, to the Taxpayers' knowledge, in any other case. What is more, if the courts ultimately decide the question in the way the Defendants assume, such a resolution would not constitute an improper "circumvention" of *Flast*, but would merely reflect a judgment that state-taxpayer-standing rules should apply when state decisions are challenged, while federal-taxpayer-standing rules should govern challenges to federal decision-making.

Cf. *DaimlerChrysler*, 547 U.S. at 349-353 (municipal taxpayers had to satisfy state-taxpayer-standing rules, not more lenient municipal-taxpayer rules, in challenging state decisions that affected municipal fisc).

E. The vitality of the "pervasively sectarian" test is not in issue at this stage of the proceedings.

The Defendants concede that they are not asking the Court to grant certiorari on the extent to which the "pervasively sectarian" doctrine remains good law. Pet. 35. They did not raise this issue before the court of appeals, so the question was not preserved. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Nevertheless, the Defendants quote out of context a statement the Sixth Circuit made in reaching its alternative holding that the Taxpayers met the "legislative nexus" test: "the plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution." Pet. App. 23. The Defendants argue that the Sixth Circuit thus somehow injected the "pervasively sectarian" doctrine into its standing analysis. Pet. 35-36.

In fact, the Sixth Circuit's entire standing analysis was focused on how Baptist Homes is funded, not on the nature of the institution. Pet. App. 16-23. The language upon which the Defendants rely was simply a restatement by the panel of some of the Taxpayers' allegations — hence the use of the word "allegedly" — and did not constitute the court's analysis. Indeed, the Sixth Circuit began the paragraph containing the quoted language by stating its holding without even mentioning the "pervasively sectarian" nature of Baptist Homes: "the plaintiffs

have sufficiently demonstrated a link between the challenged legislative actions and the alleged constitutional violation, namely that Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds *a* religious organization." Pet. App. 22-23 (emphasis added).

In any event, the Taxpayers allege that the public funding of Baptist Homes is unconstitutional not only because Baptist Homes is pervasively sectarian but also, regardless of how sectarian the institution is, because Baptist Homes uses taxpayer dollars for religious indoctrination. Pet. App. 99-103, 105, ¶¶ 56-59, 64. To be sure, there is a significant divergence between the decisions of the Sixth Circuit and those of the Fourth and Tenth Circuits concerning the vitality of the "pervasively sectarian" inquiry. See Pet. 35. This case, in its current posture, does not present an opportunity to resolve that tension. The Court may well have an opportunity to consider the matter if the case were to circle back to the Court after the merits of the Taxpayers' claims are adjudicated. At that time, the Court would also be able to consider the standing issue presented by the Petition, most likely with the benefit of additional analysis from intervening decisions by the courts of appeals. See *MLB Players Association* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001).

* * *

In sum, the Court would be engaging in a purely academic exercise if it were to grant certiorari on the questions that the Petition presents. And the ruling that the Questions Presented challenge is consistent with the decisions of this Court, involves a matter that is undeveloped in the courts of appeals, and was

eminently correct. The Court should allow the courts of appeals further opportunity to develop the issue, and if a full-fledged circuit split were to arise, the Court would have ample opportunity to consider the issue in the future — in this case or another — with the benefit of other lower courts' input.

II. The Sixth Circuit's alternative holding that the Taxpayers satisfy the "legislative nexus" test does not merit this Court's review.

As explained in section I(A) above, the Sixth Circuit's alternative holding is not properly before this Court because it was not raised in the Petition's "Questions Presented." But even if it had been properly raised, the alternative holding is even less worthy of the Court's treatment than the questions that *were* presented. The Sixth Circuit's alternative holding represents a straightforward application of this Court's precedents. The alternative holding does not conflict with any ruling of another court of appeals. At most, the "asserted error consists" of "the misapplication of a properly stated rule of law" (cf. Sup. Ct. R. 10), though even that claim is specious.

A. The Sixth Circuit's application of the "legislative nexus" test does not conflict with any decision of this Court.

The Defendants take issue in several ways with how the court of appeals applied the "legislative nexus" test. But the Defendants do not take issue with the panel's statement of the legal standard: that taxpayers must "demonstrate a link between the challenged legislative actions and the alleged constitutional violations." Pet. App. 22-23. The panel's application of that standard to the facts of

the case falls well outside the range of issues worthy of this Court's review.

The Defendants contend that the Taxpayers failed to challenge any particular statute or appropriation. Pet. 22, 27. In fact, the Taxpayers challenge "as applied" the statutes and appropriations authorizing the funding of Baptist Homes. Cross-Pet. App. 23a-25a, ¶¶ 22, 66. To the extent that the Defendants contend that the "legislative nexus" test limits taxpayers to facial challenges, their argument is foreclosed by *Bowen*, 487 U.S. 589. Although the statute authorizing the funding challenged by the taxpayer-plaintiffs there was facially constitutional, the Court held that the plaintiffs had standing to bring an "as-applied" challenge aimed solely at the religious use of specific grants. *Id.* at 618, 620-622; see also *Flast*, 392 U.S. at 87, 89-90 (plaintiffs were allowed to proceed even though they asserted that aid was being provided to religious schools in a manner *prohibited* by the statute in question, and even though they took issue with a single school district's provision of aid).

Second, the Defendants suggest that taxpayer standing exists only when legislation expressly calls for public funding to be directed to a religious institution in an unconstitutional manner. See Pet. 22-23, 26. Again, this is contrary to *Bowen*, for the legislation that authorized the grants at issue there did not require that any grant moneys be provided to religious or even private organizations. See 487 U.S. at 593, 604, 608. Instead, Congress merely "*contemplated* that some of those moneys *might* go to projects *involving* religious groups." *Hein*, 551 U.S. at 607 (citing *Bowen*, 487 U.S. at 595-596) (emphasis added). In addition, in *Flast*, the legislation at issue

did not even mention religious schools, much less require that any aid to them be delivered in an unconstitutional manner. See 392 U.S. at 86-88. And in *Hein*, the Court found standing lacking where the challenged spending was not "expressly *authorized or* mandated" by Congress. 551 U.S. at 608 (emphasis added).

Third, and relatedly, the Defendants argue that standing is lacking because Kentucky executive-branch officials had discretion to decide whether to fund Baptist Homes. Pet. 26-27. Once more, *Bowen* forecloses the Defendants' contention, as the Court there held that the plaintiffs had standing to challenge specific grants that the federal executive branch had awarded on a discretionary basis. 487 U.S. at 618-620. In *Flast* too, federal, state, and local executive officials exercised considerable discretion over how the statute in question was implemented. See 392 U.S. at 86-87, 90 & n.3.

Fourth, the Defendants complain about the Sixth Circuit's statement that the Kentucky legislature has long been aware that it has been funding Baptist Homes. Pet. 26-27. The panel's statement simply echoes the *Hein* plurality's observation — made in explaining why the taxpayers had standing in *Flast* — that because the authorizing statute there was passed at a time when most private schools were religious, Congress "surely understood" that the aid made available by that statute for students in private schools "would find its way to religious schools." 551 U.S. at 604 n.3. Here, the Kentucky legislature had actual knowledge that its funding was going specifically to Baptist Homes. And the panel did not err by considering evidence of legislative knowledge that arose after the initial

complaint was filed but before the Second Amended Complaint was submitted, for when a complaint is amended it is proper for courts to look at the facts that exist at the time of amendment in assessing standing. See *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 51 (1991).

More generally, the Defendants contend that *Hein* substantially narrowed the circumstances where standing is available under the "legislative nexus" test. Pet. 23-26. In fact, *Hein* left all of the Court's precedents intact. The Court was confronted with unusual circumstances unlike those presented by any of the Court's other taxpayer-standing cases. The activities challenged in *Hein* were financed not by money designated by Congress for any particular program or function, but out of general, lump-sum appropriations that executive-branch departments could use for any purpose. 551 U.S. at 595, 607-608. And what the *Hein* plaintiffs challenged was not the payment of public funds to religious institutions that used such funds for religious indoctrination, but merely certain statements made by executive-branch officials promoting federal aid to faith-based institutions. *Id.* at 592, 595-596. The plurality in *Hein* thus carefully limited the case's holding: federal taxpayers lack standing to challenge such "a purely discretionary Executive Branch expenditure." *Id.* at 615. The opinion cautioned, "[w]e need go no further to decide this case" and "we decide only the case at hand." *Ibid.* The plurality expressly rejected a request to overrule *Flast*, and it cited *Bowen* with approval. *Id.* at 606-608, 615.

Here, the Taxpayers challenge the payment of more than one hundred million dollars to a private religious organization; the religious organization is

financed through programs specifically authorized and funded by the Kentucky legislature; the legislature has repeatedly appropriated funding for these programs with knowledge that the funding would be paid specifically to this religious organization; and the legislature even designated a specific amount for this religious organization by name. The panel's decision thus falls squarely within a long line of cases where taxpayers have been permitted to challenge the distribution by administrative officials of substantial amounts of public aid to private religious institutions pursuant to a legislatively authorized scheme. See, *e.g.*, *Mitchell*, 530 U.S. 793; *Agostini*, 521 U.S. 203; *Bowen*, 487 U.S. at 619-620; *Ball*, 473 U.S. at 380 n.5; *Roemer*, 426 U.S. at 744; *Hunt*, 413 U.S. at 735; *Tilton* v. *Richardson*, 403 U.S. 672, 675-676 (1971); *Flast*, 392 U.S. at 85-88; see also *Freedom From Religion Foundation* v. *Bugher*, 249 F.3d 606, 608-611 (7th Cir. 2001); *DeStefano* v. *Emergency Housing Group*, 247 F.3d 397, 403-405 (2d Cir. 2001); *Lamont* v. *Woods*, 948 F.2d 825, 829-831 (2d Cir. 1991); *Pulido*, 860 F.2d at 297-298.

B. The Sixth Circuit's application of the "legislative nexus" test does not create any conflict among the courts of appeals.

In suggesting that a circuit split exists over how the "legislative nexus" test should be implemented, the Defendants cite only two cases: *Hinrichs*, 506 F.3d 584, and *Prison Fellowship*, 509 F.3d 406. Pet. 17-18. Neither of these decisions conflicts with the panel's ruling.

The practice at issue in *Hinrichs* — the Indiana House's opening of its sessions with sectarian

prayers — was not authorized by any statute. 506 F.3d at 598-599. It was funded not by any specific appropriation, but out of general House operating funds. *Id.* at 587, 598-599. As noted above, the contested expenditures were minimal and did not support the challenged aspect of the prayers. *Id.* at 587, 598. And, similarly to *Hein*, the plaintiffs were not challenging any payments outside the government to private parties for religious activities, but instead were seeking an injunction against an internal practice of the state government. *Id.* at 585, 587, 598. There is not even a remote conflict between the Seventh Circuit's denial of standing on those facts and the Sixth Circuit's conclusion below.

Nor is there any conflict between the decision below and the ruling in *Prison Fellowship*, 509 F.3d at 420, upholding taxpayers' standing to challenge a religious prison program. Contrary to what the Defendants contend (cf. Pet. 18), nothing in *Prison Fellowship* suggests that taxpayers must identify an appropriation that specifically requires funding of a religious program. In fact, the appropriations in *Prison Fellowship* were merely "for a values-based treatment program" at a prison and left the Iowa executive branch with discretion to select a secular contractor. *Id.* at 417-418, 420. The Eighth Circuit indicated that the Iowa legislature knew when it passed the appropriations that the Iowa executive branch had already selected a religious contractor as the provider of the program, although the court did not suggest that such knowledge was required. See *id.* at 420. The Eighth Circuit thus found standing despite the exercise of executive discretion and partly in reliance on legislative knowledge — just like the Sixth Circuit below.

It is hardly surprising that there is no inter-circuit conflict over how the "legislative nexus" test should be implemented, given that *Hein* was issued less than three years ago. Perhaps such a conflict may develop with time, but none has surfaced to date, so there is no reason for the Court to take up the matter now.

CONCLUSION

The issue presented by the Defendants — whether state taxpayers must meet the "legislative nexus" test — is not ripe for this Court's review. Even if it were, in order to avoid engaging in a purely academic exercise, the Court would need to adjudicate another issue not presented by the Petition. That issue — *how* the "legislative nexus" test should be applied — falls well outside the range of issues worthy of this Court's consideration and was resolved consistently with the decisions of this Court and the other circuits. The Petition should be denied.

Respectfully submitted.

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APPENDIX

APPENDIX

Ky. Rev. Stat. Ann. § 199.801. Procedure for placement of children who are in custody of department; statewide and district placement coordinators; cases of unmet need; information and recommendations; state resource plan; assistance in developing facilities services plan.

(1) The department shall establish a procedure throughout the state that is designed to determine and expedite the placement of children who are in the custody of the department. The procedure shall utilize a statewide placement coordinator and district placement coordinators who may be state employees or employees of a contracted entity, and who shall be assigned and located in each of the department's districts.

(2) Upon determining that a child shall be removed from the current living arrangement, the social service worker with responsibility for the child shall contact the district placement coordinator to facilitate the placement. In consultation with the social service worker, the district placement coordinator shall determine the appropriate type of placement according to the child's circumstances and needs and shall attempt to locate the appropriate placement within the child's home county.

(3) The living arrangement and placement selected for the child shall be the type of facility that is determined to be the best alternative for the child that is in the closest proximity to the child's home county.

(4) If the type of placement that best suits the child's needs is not available in the child's home county, the district placement coordinator shall document the circumstance as an unmet need and may seek a placement in another county located within the home district of the child.

(5) If the type of placement that best suits the child's needs is not available in the child's home district, the district placement coordinator shall document the circumstance as an unmet need and may seek a placement in surrounding districts by contacting the statewide placement coordinator.

(6) If the type of placement that best suits the child's needs is not available in the districts surrounding the child's home district, the district placement coordinator shall document the circumstance as an unmet need and may seek a placement in any district within the state by contacting the statewide placement coordinator.

(7) If the type of placement that best suits the child's needs is not available within the state, the statewide placement coordinator shall contact the commissioner of the department or the commissioner's designee to explore placement options.

(8) The statewide placement coordinator and every district placement coordinator shall compile information that identifies the unmet needs for their jurisdiction, and shall submit the data and recommendations for meeting the unmet needs to the commissioner of the department.

(9) The commissioner shall develop a state placement resource plan that identifies areas of unmet need and strategies to meet the need. The

plan shall be used to guide and, if necessary, restrict the development of new facilities, the expansion of existing facilities, and the geographic location of placement alternatives.

(10) The commissioner and the statewide planning coordinator shall assist the Statewide Strategic Planning Committee for Children in Placement, created in KRS 194A.146, in the development of a statewide facilities services plan.

Ky. Rev. Stat. Ann. § 199.805. Inventory of placements.

The department shall maintain an inventory of the number and types of placements available for children by county, by district, and for the state. The inventory shall be updated every week and shall show in detail for each facility or foster home how many beds are filled, how many are empty, and the type of child that would be appropriate for referral to the facility or foster home. The inventory shall be readily accessible by the statewide placement coordinator and the district placement coordinators.

Ky. Rev. Stat. Ann. § 605.100. Care, treatment, and rehabilitation of committed children.

(1) The Department of Juvenile Justice or the cabinet shall arrange for a program of care, treatment, and rehabilitation of the children committed to it, which program shall be designed to provide for classification, segregation, and specialized treatment of children according to their respective problems, needs, and characteristics and to provide a coordinated system of probation and parole services.

(2) The Department of Juvenile Justice or the cabinet shall be responsible for the operation, management, and development of the existing state facilities for the custodial care and rehabilitation of children committed to the Department of Juvenile Justice or the cabinet under provisions of this chapter. The Department of Juvenile Justice or the cabinet shall further be responsible for the development of such facilities as are necessary to provide an adequate and modern program for the care, treatment, and rehabilitation of such children.

(3) The facilities and programs under the control of the Department of Juvenile Justice or the cabinet shall be designed and operated in such a manner as to rehabilitate, train, develop, and educate the children to become good citizens and useful members of society.

(4) Suitable programs of vocational education and training shall be carried on in the facilities and programs, with the view of preparing the children for future self-support.

(5) The children in each facility and program shall be employed so far as practicable in labor incident to the maintenance and operation of the facility and program, and in suitable industries conducted by the facilities and programs as a part of the vocational training program.

(6) The superintendent or managing officer of each facility may use, for the maintenance of the facility, the products of farms, dairies, and other departments and industries of the facility or may sell or exchange such products for the benefit of the facility.

Ky. Rev. Stat. Ann. § 605.120. Payments to home where children are placed; reimbursement system for foster parents; pilot projects; kinship care program; administrative regulations; decisions regarding haircuts and hairstyles.

(1) The cabinet is authorized to expend available funds to provide for the board, lodging, and care of children who would otherwise be placed in foster care or who are placed by the cabinet in a foster home or boarding home, or may arrange for payments or contributions by any local governmental unit, or public or private agency or organization, willing to make payments or contributions for such purpose. The cabinet may accept any gift, devise, or bequest made to it for its purposes.

(2) The cabinet shall establish a reimbursement system, within existing appropriation amounts, for foster parents that comes as close as possible to meeting the actual cost of caring for foster children. The cabinet shall consider providing additional reimbursement for foster parents who obtain additional training, and foster parents who have served for an extended period of time. In establishing a reimbursement system, the cabinet shall, to the extent possible within existing appropriation amounts, address the additional cost associated with providing care to children with exceptional needs.

(3) The cabinet shall review reimbursement rates paid to foster parents on a biennial basis and shall issue a report in October of each odd-numbered year to the Legislative Research Commission comparing the rates paid by Kentucky to the figures presented in the Expenditures on Children by Families Annual Report prepared by the United States Department of

Agriculture and the rates paid to foster parents by other states. To the extent that funding is available, reimbursement rates paid to foster parents shall be increased on an annual basis to reflect cost of living increases.

(4) The cabinet is encouraged to develop pilot projects both within the state system and in collaboration with private child caring agencies to test alternative delivery systems and nontraditional funding mechanisms.

(5) To the extent funds are available, the cabinet may establish a program for kinship care that provides a more permanent placement with a qualified relative for a child that would otherwise be placed in foster care due to abuse, neglect, or death of both parents.

(6) The cabinet shall promulgate administrative regulations in accordance with KRS Chapter 13A to implement the provision of subsection (5) of this section. The administrative regulations shall include uniform conditions and requirements regarding:

(a) Eligibility requirements for the kinship caregiver and the child;

(b) Financial assistance and payment rates; and

(c) Support services and case management services that may be provided to the kinship caregiver or the child.

(7) Foster parents shall have the authority to make decisions regarding haircuts and hairstyles for foster children who are in their care for thirty (30) days or more.

KENTUCKY 2006 SESSION LAWS
2006 REGULAR SESSION

CHAPTER 252
HB 380
APPROPRIATIONS--EXECUTIVE BRANCH BUDGET

AN ACT relating to appropriations and revenue measures providing financing and conditions for the operations, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state-supported activities.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

* * * * *

H. CABINET FOR HEALTH AND FAMILY SERVICES

Budget Units

10. COMMUNITY BASED SERVICES

	2005-06	2006-07	2007-08
General Fund (Tobacco)	-0-	6,970,400	7,420,400
General Fund	-0-	316,033,500	341,729,700
Restricted Funds	-0-	133,505,800	136,301,300
Federal funds	4,900,300	511,118,200	523,230,400
TOTAL	4,900,300	967,627,900	1,008,681,800

* * * * *

(2) **Out-of-Home Care:** Included in the above General Fund appropriation is $7,383,000 in fiscal year 2006-2007 and $22,962,600 in fiscal year 2007-2008 which is necessary to support and sustain the

increased number of court-committed children in the care of the Cabinet.

* * * * *

(7) Private Child Care Provider Rate Increases: Included in the above appropriation to increase Private Child Care Provider reimbursement rates beginning on July 1, 2007, is $2,883,700 in General Fund moneys and $544,800 in Federal Funds for an additional $3 per day in fiscal year 2007-2008.

(8) Performance Incentives for Hard-to-Place Youth: Included in the above appropriation is $961,200 in General Fund moneys and $181,600 in Federal Funds in fiscal year 2007-2008 to create a pool to serve hard-to-place youth by providing performance incentives to private child care providers beginning on July 1, 2007.

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No. 09-1121

Supreme Court, U.S.
FILED
JUN 1 - 2010
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In The
Supreme Court of the United States

J. MICHAEL BROWN, Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, JANIE P. MILLER, Secretary of the Cabinet for Health and Family Services, Commonwealth of Kentucky, and KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.,

Petitioners,

v.

ALICIA PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, and ELWOOD STURTEVANT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Hinrichs v. Speaker of the House of Representatives of the Indiana Gen. Assembly, 506 F.3d 584 (7th Cir. 2007) ..... *passim*

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REPLY BRIEF FOR THE PETITIONERS

This case presents the Court with an excellent opportunity to ensure that the lower courts uniformly apply fundamental principles of Article III jurisdiction in the context of the incorporated Establishment Clause. The two distinct Questions Presented stated in the Petition directly address important aspects of the proper State taxpayer standing test, providing this Court with an ideal vehicle to complete the guidance it began in *DaimlerChrysler v. Cuno*, 546 U.S. 342 (2006) and *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007).

The Respondents do not question the importance of ensuring uniformity in Article III jurisprudence. They even concede that an acknowledged circuit split exists on the legal test used to determine State taxpayer standing in Establishment Clause cases. They attempt nonetheless to explain away this conflict. The attempt fails. The contradictory positions of the Sixth and Seventh Circuits will not change, and the resulting lack of uniformity will only spread throughout the Circuits over time.

Respondents also sidestep this Court's key precedents: those that forcefully equate State taxpayer standing and federal taxpayer standing in at least non-Establishment Clause cases; those that rigorously apply the *Flast v. Cohen*, 392 U.S. 83 (1968) "legislative enactment" nexus test in the context of federal taxpayer standing; and those that equate the First Amendment obligations of State and federal

governments. The Respondents' artful parsing of taxpayer standing jurisprudence should not dissuade the Court from promptly addressing the compelling, universal issues at the core of this suit: Article III jurisdiction, federalism, the funding of critical social services providers, and taxpayer rights. The Petition should be granted.

A. The Petition presents two compelling questions that, when answered, will ensure uniform State taxpayer standing requirements in Establishment Clause cases across all circuits.

The Questions Presented by the Petition provide the Court with far more than the opportunity to advance an "academic exercise." Petitioners' first question asks this Court to decide whether *Flast*'s "legislative enactment" nexus test applies to State taxpayers alleging Establishment Clause violations. This question addresses the Sixth Circuit's primary State taxpayer standing analysis and holding, which is premised on its own precedent in *Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501 (6th Cir. 2001), and which diverges from the Seventh Circuit's holding in *Hinrichs v. Speaker of the House of Representatives of the Indiana Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007) (rehearing *en banc* denied Jan. 14, 2008).

Petitioners' second question squarely addresses the Sixth Circuit panel's alternative State taxpayer

standing analysis and holding, which purports to apply the *Flast* "legislative enactment" nexus test to Kentucky's administration of executive branch contracts with KBHC. This second question asks:

> Does Article III confer upon the federal courts broader authority to address alleged Establishment Clause violations by State Legislatures than those same courts have to address alleged Establishment Clause violations by Congress?

(Petition, ii). The possible answers to this question lie at the intersection of the incorporated Establishment Clause and Article III's standing requirements.

Flast's two-part "legislative enactment" nexus test ensures there is a sufficient injury for a taxpayer to have Article III standing. *Flast*, 392 U.S. at 99-103. As the Petition explains in detail, the Sixth Circuit's alternative analysis fundamentally altered this test in the context of State taxpayers, and considered Kentucky legislative activity besides those "legislative enactments" that appropriate money, or expressly require or contemplate the appropriation of money, as is required for federal taxpayers under the actual *Flast* test. Petition, 22-28. Through this errant alternative holding, the Sixth Circuit effectively adopted a new and much more lenient Article III nexus test for State taxpayers that differs significantly from the *Flast* Article III "legislative enactment" injury test for federal taxpayers.

This result – two distinctly different "nexus" tests for State and federal taxpayers –illogically suggests that federal courts must necessarily treat an alleged Establishment Clause violation by a State legislature as a more tangible taxpayer injury than the same alleged violation by Congress, thereby requiring a less stringent test. If the Petition's second Question Presented is answered in the negative, the Sixth Circuit's decision to apply a more lenient nexus test, necessarily implying a greater Establishment Clause injury to State taxpayers, is clearly erroneous. Thus, the Petition's two Questions Presented invite the Court to explore both aspects of the panel's decision and ensure uniformity among the Circuits in these important Article III determinations.

B. The Questions Presented reflect significant circuit conflicts.

1. Respondents do not dispute the acknowledged conflict between the Sixth and Seventh Circuits regarding the applicability of the *Flast* "legislative enactment" nexus test to State taxpayers in Establishment Clause cases. Instead, Respondents dismiss the Seventh Circuit's analysis in *Hinrichs* and speculate that the circuit split might even resolve itself. These criticisms are groundless.

First, the positions of the Sixth and Seventh Circuits are fixed, barring a superseding decision by this Court: the lower courts denied *en banc* review both in this case and in *Hinrichs,* respectively. The

Seventh Circuit, moreover, does not reverse itself as easily as Respondents suggest. *See U.S. v. Walton*, 255 F.3d 437, 443 (7th Cir. 2001) ("[W]e are obliged to give considerable weight to our prior decisions unless and until they have been overruled or undermined by the decision of a higher court . . . [i]n addition, the fact that other circuits have come to a different conclusion . . . is not a sufficiently compelling reason . . . to prompt us to overturn [our prior holding]."); *U.S. v. Mitten*, 592 F.3d 767, 779 (7th Cir. 2010) (rejecting invitation to reconsider earlier decision in light of conflicting view by Second Circuit because *en banc* review had been denied). In addition, by its own rules, the Sixth Circuit panel opinion is binding on all subsequent panels. 6 Cir. R. 206(c).

The Seventh Circuit's State taxpayer standing analysis in *Hinrichs*, furthermore, cannot be brushed aside. It specifically addresses the applicability of *Flast* to State taxpayers, and constitutes an effective counterpoint to the Sixth Circuit's analysis below. *Hinrichs*, of course, was decided by the Seventh Circuit soon after that court had been reversed by this Court in *Hein*. The Seventh Circuit undoubtedly had a heightened awareness of this Court's strict taxpayer standing precedent when it initially decided *Hinrichs* and later declined rehearing *en banc*. If the *Hinrichs* panel did not spend inordinate effort or spill excessive ink pondering whether the *Flast* "legislative enactment" nexus test was appropriate, it is because this Court's equivalent treatment of State and federal taxpayer standing in decisions like *ASARCO Inc. v.*

Kadish, 490 U.S. 605, 613-14 (1989) and *Cuno* left little room for debate. A better question for this Court to ask (and answer) is why the Sixth Circuit went to such lengths to avoid the clear import of this Court's *Hein* and *Cuno* decisions – only to then hedge its choice with an alternative holding.[1]

This Court need not, and should not, tolerate overt conflict in the lower courts on critical questions of Article III jurisdiction on the off chance, years or decades from now, that the split might resolve itself. The only plausible result of waiting would be a widening of the conflict, as the nation's appellate courts line up behind the positions of either the Sixth or Seventh Circuits. The Petition should be granted so this conflict can be resolved now.

2. Respondents also attempt to explain away the circuit conflict created by the Sixth Circuit's alternative holding by mischaracterizing the Petitioners' argument and unreasonably limiting *Hinrichs* and *Am. United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007) to their specific facts. Respondents, however, cannot reconcile the fundamental difference

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[1] This generally recognized equivalence of State and federal taxpayers is also reflected in the decisions of the Second, Fifth, Eighth, Ninth and Eleventh Circuits cited on pages 16-17 of the Petition. The Sixth Circuit's decision to create two different standing tests for federal and State taxpayers – whether by applying two different versions of the *Flast* test or by refusing to apply *Flast* at all – conflicts with each of these decisions.

between the stringent *Flast* "legislative enactment" nexus test used in *Hinrichs* and *Prison Fellowship* and the looser nexus test crafted by the Sixth Circuit below.

The *Hinrichs* and *Prison Fellowship* decisions scrutinized whether the "legislative enactments" alleged to support taxpayer standing were the same "legislative enactments" alleged to have violated the Establishment Clause, thus arguably forming the "logical link" required by *Flast* and reaffirmed in *Hein*. *Flast*, 392 U.S. at 102; *Hein*, 551 U.S. at 602. While standing was found in *Prison Fellowship* and not in *Hinrichs*, the two decisions applied *Flast* identically and correctly.

Here, however, a fundamentally different nexus test was used by the court below to find State taxpayer standing. The Sixth Circuit required only a "nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution," not-so-subtly expanding the *Flast* "legislative enactment" test through a relaxed restatement, and effectively creating a new, quasi-*Flast* test in the context of State taxpayer standing. *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 733 (6th Cir. 2009). None of the Kentucky legislative activities on which the Respondents base their State taxpayer standing here (generic authorizing statutes, child care regulatory statutes, bricks-and-mortar appropriation, benign legislative commendation) constitutes the actual Establishment Clause violations alleged in their complaint. The Sixth Circuit's new

test severs the crucial link between the State "legislative enactment" spending taxpayer funds and the constitutional limitation on that spending – in marked contrast to *Flast*, *Hein*, *Hinrichs*, and *Prison Fellowship*. Accordingly, a serious conflict with other circuits and this Court exists on the Sixth Circuit's alternative holding as well.[2]

C. Important Article III and First Amendment considerations support applying the *Flast* "legislative enactment" nexus test to State taxpayers.

1. The *Flast* "legislative enactment" nexus test is rooted in the unique limitations the Establishment Clause places on State and federal legislative spending, not in the specific role Congress generally plays in federal spending. As a general proposition, taxpayer standing is not permitted. *Hein*, 551 U.S. at 593, 599. *Flast* created a narrow exception to this general bar as a means of determining whether a federal expenditure constitutes a distinct enough taxpayer injury to support Article III standing. To date, the only circumstance where this Court has

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[2] These conflicts strongly suggest taxpayer litigants will choose to litigate Establishment Clause claims involving the use of federal pass-through funds in the standing-friendly Sixth Circuit States. The Social Security Act applies uniformly to all States – but under the panel's test, the funds appropriated by the federal executive branch to Kentucky, Tennessee, Ohio, and Michigan will be subject to a different, more exacting level of scrutiny.

found a "legislative enactment" nexus sufficient for taxpayer standing involves violations of the Establishment Clause. *Cuno*, 547 U.S. at 347. This Court has, furthermore, repeatedly affirmed that the Establishment Clause applies equally to State and federal governments. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983). It necessarily follows that violations of that clause should cause the same level of injury, in the same way, regardless of the sovereign that commits the violation. The necessity of applying the same test to both State and federal taxpayers is primarily compelled by the Establishment Clause's equal application to both State and federal governments.

2. In the context of federal taxpayer standing, the *Flast* "legislative enactment" nexus test is consistent with the separation of powers between the three federal branches of government. The ultimate purpose of the *Flast* test, however, is not to guarantee the separation of powers, but to ensure that an Article III "case or controversy" exists. Even in the prudential areas of Article III standing, the federal judiciary's concerns have always been with the proper scope of its own authority. Judicial restraint is just as important – if not more important – in the context of protecting the political branches of the States from undue federal judicial oversight of their affairs. *See Horne v. Flores*, 129 S.Ct. 2579, 2593-94 (2009) ("Federalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities."). While the *Flast* test

is only applicable in federal courts, the Article III interests that test serves extend beyond Congress and the President and apply whenever the federal judiciary is called upon to review the actions of other legislative and executive bodies.

3. The practical application of *Flast* to State governments is well within the capacity of the lower federal courts. In fact, every State has a legislative branch that, like Congress, levies taxes, creates budgets, and appropriates State monies – with some level of involvement or oversight by the executive and judicial branches or even public referenda. Nonetheless, each State's legislature has the principal role in initiating the taxing and spending of taxpayer dollars. Indeed, Respondents fail to identify a single State where the executive branch, the judicial branch, or the citizenry has unilateral authority to appropriate funds from its treasury.

Respondents erroneously describe Section 50 of the Kentucky Constitution as an example of a State handing over spending authority to its citizenry (Response at 21), but that provision does nothing of the sort. Section 50 prohibits the General Assembly from incurring more than $500,000 in debt without passing a tax, subject to voter approval, to pay for it. This section simply requires the General Assembly to pass a balanced budget unless the voters say otherwise. This section does *not* transform the voters themselves into the instruments of State taxing and spending. Instead, the section requires the money to be spent by the General Assembly, the debt to be

incurred by the General Assembly, the required tax to be passed by the General Assembly, and the matter to be submitted for the voters' approval by the General Assembly. Respondents' sudden invocation of Section 50 – the first such reference in the ten years of this litigation – is a red herring, and does nothing to distinguish the manner with which Kentucky and the federal government rely on their legislatures to spend taxpayer funds.

In any event, Respondents' efforts to distinguish the applicable tests for State and federal taxpayer standing on the basis of which branch may be spending taxpayer money (*i.e.*, Congress versus State executive branches and popular referenda) are futile. *Flast* created a narrow exception to the general bar on taxpayer standing for plaintiffs who challenge a "legislative enactment" that spends public funds in a manner that directly violates the Establishment Clause. As the holdings of *Valley Forge Christian College v. Am. United for Separation of Church and State*, 454 U.S. 464 (1982), *Cuno*, and *Hein* make clear, however, public spending outside of this exception cannot yield standing. Accordingly, if challenged State spending is not the result of a "legislative enactment," the proper outcome is dismissal for lack of standing pursuant to *Flast*, not the creation of a new test that broadens *Flast*'s requirements for the sole purpose of manufacturing standing that would not otherwise exist. The scenarios envisioned by the

Respondents would by definition fall outside of *Flast*'s narrow "legislative enactment" exception.

D. The Questions Presented merit the Court's prompt review.

This case allows the Court to address important issues of Article III jurisdiction, federalism, and Establishment Clause jurisprudence. At issue is not only the power of the federal courts to review and potentially interfere in the fiscal decisions of sovereign States at the behest of taxpayers, but the scope of the First Amendment as incorporated to those States. Respondents do not dispute the importance of these issues; in fact, they filed a conditional cross-petition regarding the Sixth Circuit's application of *Flast* in the federal taxpayer context.

The Court should grant certiorari on the Petition's threshold Article III questions now, and reject the Respondents' invitation to address the merits before resolving these issues of subject matter jurisdiction. This Court's recent cases reflect a strong commitment to ensuring Article III standing is addressed and definitively resolved as a threshold inquiry. *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999) (unanimously holding that federal courts must confirm subject matter jurisdiction before considering the merits of a case);[3] *Steel Co. v. Citizens*

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[3] Notably, the Court granted certiorari in *Ruhrgas* to decide a threshold jurisdictional question that was the subject of a

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for a Better Environment, 523 U.S. 83, 88-89 (1988). Further proceedings on the merits, moreover, would not affect the Respondents' standing in the slightest. If Respondents ultimately prevail on the merits, the posture of standing remains unchanged; after all, the allegations of the Complaint are already presumed to be true when conducting standing analyses. The issue of standing would still have to be litigated and resolved. If Petitioners prevail on the merits, the question of standing would be moot – but, as cases like *Ruhrgas* and *Steel Co.* make abundantly clear, subject matter jurisdiction may not simply be assumed in the meantime. It should be addressed now.

The Petition presents the sort of compelling jurisdictional questions this Court has often reviewed in recent terms, both at the behest of litigants and on its own initiative. *See, e.g., Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, May 24, 2010 (Case Nos. 09-987, 09-991) (addressing related, though not identical, State taxpayer standing questions in Establishment Clause context). This Court should not hesitate to grant certiorari and ensure Article III and the

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circuit conflict involving two circuits – specifically, a 1996 Second Circuit decision and the 1998 Fifth Circuit decision under review. 526 U.S. at 583, n.7. Thus, this Court should not be dissuaded by the Respondents' argument that the circuit conflicts in this case are too recent, or involve too few circuits, to warrant review. Indeed, in *Cuno*, this Court granted certiorari and then asked the parties to address Article III standing *sua sponte*. *Cuno*, 547 U.S. at 340.

Establishment Clause are interpreted uniformly by the lower courts.

Respectfully submitted,

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